Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

CRAIG DICKHAUS, DEBBIE MILLER, and RICHARD WOODSIDE,

Petitioners,

v.

CALVIN B. CHAMPION, personal representative of the estate of Calvin D. Champion,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether, in a case alleging the use of unconstitutional excessive force, general excessive force cases and training guidelines, which, when implemented in the field, require the officer's use of judgment can give an officer fair warning that his conduct violates the Fourth Amendment, thereby denying him qualified immunity?

(2) When neither this Court nor any circuit court has ruled that the Fourth Amendment is violated when an officer lies on the back of a combative arrestee after he is restrained, is the law "clearly established" and thus the officer properly denied qualified immunity from civil rights liability?

(3) When neither this Court nor any circuit court has ruled the Fourth Amendment is violated when an officer pepper sprays a combative arrestee after he is restrained, is the law "clearly established" and thus the officer properly denied qualified immunity from civil rights liability?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were:

Petitioners: At the time of the events giving rise to this case, Officer Craig Dickhaus, Officer Debbie Miller, and Officer Richard Woodside were police officers employed by the Metropolitan Government of Nashville and Davidson County. They are the petitioners herein and were defendants/appellants below. The Metropolitan Government was also a named defendant, but it was granted summary judgment on all claims against it prior to trial. Thus, it is not a party to this petition. Outlook Nashville, Inc. and its employee, Jolene Delelys, were also defendants below. Judgment was rendered against them at trial, but they did not partake in the appeal to the Sixth Circuit Court of Appeals.

Because the petitioners herein are three individuals, Supreme Court Rule 29.6 requires no disclosures.

Respondents: Calvin B. Champion, personal representative of the estate of Calvin D. Champion, is the respondent herein since he brought the claims which are the subject of this petition exclusively in his capacity as the estate's representative. Both he and his daughter, Jetonne Champion-Collins, were plaintiffs in their individual capacities at the trial court as to the tort claims against the non-governmental defendants. However, these claims were not the subject of the appeal to the Sixth Circuit Court of Appeals, nor are they the subject of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Officer Craig Dickhaus, Officer Debbie Miller, and Officer Richard Woodside respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit (App., 1a-30a) is reported at 380 F.3d 893. The Sixth Circuit's order denying rehearing and rehearing *en banc* (App., 54a-55a) is unreported. The district court's opinions and orders (App., 31a-53a) are unreported.

STATEMENT OF JURISDICTION

The opinion and judgment of the Sixth Circuit (App., 1a-30a) was entered on August 19, 2004. A petition for rehearing and rehearing *en banc* was denied on November 2, 2004 (App., 54a-55a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents initiated this action against petitioners as a civil rights claim for damages under 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT OF THE CASE

This is a Fourth Amendment civil rights use of force case involving three police officers' attempts to control Calvin D. Champion, a non-verbal, severely mentally retarded, autistic, thirty-two-year-old, 209-pound man with an unknown heart defect, who had assaulted his caregiver and a police officer and then fiercely resisted arrest in a children's store parking lot. In denying qualified immunity to Officer Craig Dickhaus, Officer Debbie Miller, and Officer Richard Woodside, the Sixth Circuit Court of Appeals' opinion is completely at odds with the decisions of other circuit courts that have considered whether police officers are entitled to qualified immunity under similar circumstances. The opinion below also illustrates how the Sixth Circuit voids this Court's repeated pronouncements that qualified immunity cannot be denied simply because the relevant "legal rules" are established at some "level of generality." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *see*, *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Brosseau v. Haugen*, ___ U.S. ___, 125 S.Ct. 596, 599-600 (2004). In sum, the Sixth Circuit departed from the qualified immunity standard of "'giv[ing] ample room for mistaken judgment' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

After a harrowing experience trying to restrain Mr. Champion ("Champion"), which included desperate calls for help from his caregiver and Champion grabbing Officer Debbie Miller by the throat, the officers were finally able to place handcuffs and a hobble restraint on him despite ferocious attempts by him to prevent restraint. The factual specifics leading up to this point are not disputed. After this point, divergent accounts exist as to Champion's actions and the officers' actions, namely the officers allegedly lying on Champion's back and the alleged use of pepper spray by Officer Debbie Miller. Nevertheless, even accepting respondent's witnesses' testimony regarding the actions of the officers, the Sixth Circuit inexplicably determined that no reasonable officer would have concluded these actions were constitutional. The Court reached this conclusion despite the existence of opinions from other circuits finding that similar actions of officers under similar circumstances did not violate clearly established rights and in the absence of any Sixth Circuit opinion or other circuit opinion finding that similar actions of officers under similar circumstances violated clearly established rights.

1. Incident Giving Rise to Case

Plaintiffs' decedent, Calvin D. Champion ("Champion"), was a thirty-two-year-old, 209-pound, mentally disabled, autistic man. He was unable to speak, and unable to care for himself. Outlook Nashville, Inc. ("Outlook"), which provided care for developmentally disabled individuals, was responsible for Champion's care. On Sunday, April 30, 2000, Jolene Delelys ("Delelys"), an Outlook employee, was assigned as Champion's relief caregiver for that weekend so his regular caregiver could take the weekend off.

Delelys drove Champion and her three-year-old son, Devin, to a Nashville Babies "R" Us store. After doing some shopping, they returned to the Outlook van, and Delelys placed Devin and Calvin in the vehicle. Delelys started to drive away when Champion suddenly became very agitated and began sliding back and forth across his seat, rocking the van, slapping his head, and biting his hand. He also slapped the top of Devin's head, and Devin began to cry. Delelys decided to get Champion out of the van. Once outside the van, Champion grabbed Delelys' right hand and brought it up to his head and forced her to start rubbing all around his head, a response which unbeknownst to Delelys, had helped Champion calm down in the past. Champion then grabbed Delelys' shirt and ripped it. She was extremely frightened and she felt she had lost control of the situation. She pulled herself free, got back into the van, and locked the doors.

After making repeated unsuccessful attempts to call the emergency number for Outlook, Delelys called 911. Immediately upon hanging up from her 911 call, Delelys saw Officer Debbie Miller at the driver's side window of her van. Passers-by had observed what was happening in the parking lot between Champion and Delelys, and they had initiated 911 calls a few minutes before Delelys had placed her call. Delelys told Officer Miller Champion's name and informed her that Champion was mentally handicapped or mentally challenged. Delelys, however, did not tell Officer Miller that Champion was nonverbal and nonresponsive.

At this point, Champion was walking around the vehicle, hitting the vehicle, hitting himself on the head, and biting himself on the ball of his hand. Officer Miller approached Champion and asked him for his name and to

tell her whether he had a problem. Champion pursued Officer Miller through the store's parking lot, with Champion advancing and Officer Miller walking backwards, continually facing him, and repeatedly asking him his name. Officer Miller repeatedly ordered him to stop and to stand where he was and not come any closer to her. He never verbally responded. After retreating backwards through the parking lot for about 50 feet, Officer Miller stopped walking backwards. However, Champion kept advancing upon Officer Miller until he got so close to her that he grabbed her shirt collar. Officer Miller knocked Champion's hand away from her shirt collar and she gave a short burst of pepper spray to Champion's face.

Champion let go of Officer Miller's shirt, began wiping his eyes, and started walking toward the entrance to the store. Champion entered the store, went to the customer service counter, and picked up some clothes and wiped his face with the clothing. When he went behind the customer service counter, Officer Miller touched him on his arm and told him he had to leave. Champion complied with this command, giving Officer Miller the false impression that Champion actually understood her.

As they exited the store, Officer Richard Woodside arrived. Officer Miller told Officer Woodside that she had sprayed Champion and that he was "10-35" – police code for a mentally ill person. The two officers then tried to take Champion into custody while having him face against the outside front wall of the store. They gave Champion a verbal command to put his hands behind his back. With the officers on either side of Champion, he suddenly pulled away from both of them and turned around and grabbed Officer Miller by the throat with both of his hands. At that point, Officer Woodside attempted to take Champion to the

ground himself, but he was unsuccessful. He lost his balance and briefly lost contact with Champion. After regaining his footing, Officer Woodside realized that Officer Dickhaus had just arrived.

The first thing Officer Dickhaus saw when he arrived at the scene was Champion throwing Officers Miller and Woodside off of his arms and grabbing Officer Miller by the throat. Officer Miller told Officer Dickhaus that Champion was possibly "10-35" and that she had already sprayed him once. With Officer Dickhaus present, the officers decided to take Champion to the ground on the carpeted entrance foyer of the store, as opposed to on the concrete sidewalk outside. With Officer Woodside holding onto Calvin's legs, and Officers Miller and Dickhaus supporting opposite sides of Calvin's upper body, they brought Champion down to his knees. Then, from his knees, they gently laid him down on his stomach and chest on the carpeted entrance foyer.

Once on the ground, Champion continued to struggle. The officers used two pairs of handcuffs to handcuff Champion behind his back to allow him more freedom of movement of his arms than one pair would allow. However, once Champion's hands were handcuffed behind his back, he continued struggling and kicking, making it especially difficult for Officer Woodside who was having a tough time holding Champion's legs. At this point, Champion was lying facing the floor with his right shoulder on top of Officer Dickhaus' bent left leg and knee. Officer Dickhaus was trying to reassure him by saying, "Calvin, my name is Officer Craig. You and I are going to get through this together and no one is going to hurt you." Officer Miller remembers Officer Dickhaus's comments to

be along the lines of, "Sir, what's your name? Sir, calm down. What's your problem? We're here to help you."[1]

Since Champion continued to resist and kick high into the air, the officers decided to restrain Champion's legs with a "hobble" restraint.[2] When the hobble restraint was applied to Champion's ankles, he was struggling so violently that he kicked it off and it had to be applied again. Then, even after the hobble restraint was successfully applied, Officer Woodside still struggled to hold Champion's legs down.[3]

At this point, Officer Dickhaus called the Mobile Crisis Response Team.[4] However, he was unable to convey any relevant information to Mobile Crisis to see if they had records pertaining to Champion because Delelys could not provide any information about Champion other than his first name. In any event, Mobile Crisis did not have any counselors available to send to the scene to assist the officers. In a similar vein, Delelys had contacted her supervisor, who also could not help the officers because he had no information regarding Champion's last name, his diagnosis, or his history.

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[1] Like Officers Miller and Woodside, Officer Dickhaus did not know Champion was non-verbal.

[2] A "hobble" restraint is a nylon canvas strap that is looped around the ankles and then drawn together.

[3] A "hobble" restraint keeps the feet together and restricts movement of the feet forward, back, or apart, but it does not restrict bending the legs at the knees.

[4] The Mobile Crisis Response Team is an entity that has counselors available to make assessments in the field regarding whether hospitalization for mental health reasons is appropriate in a given case. It is not affiliated with the Metropolitan Police Department.

As the officers were trying to figure out where to take Champion and how to get him there, Champion began to vomit. Officer Woodside immediately called for an ambulance. Before the EMT's could arrive, Champion vomited two more times. Each time he vomited, the officers pulled Champion back so he would not be lying in his own vomit. They also checked Champion's mouth and nose to make sure he was still breathing. After these regurgitations, the officers reported that Champion was alert, blinking, breathing, and moving his head from side-to-side.

The EMT's entered the store shortly after Champion vomited for the third time. The first EMT on the scene was Douglas Baggett ("Baggett"). Baggett recalls stepping over Champion and noticing that his legs moved a couple of inches, which gave him the impression that Champion was alive. Then, Champion's "belly rose, his back rose up, and then he vomited" for the fourth time, which led Baggett to believe that he was watching Champion take his last breath. Baggett rolled Champion onto his side and checked for a pulse. Upon realizing he had no pulse, Baggett told his colleague that they were going to have to perform CPR. Baggett requested the officers to remove the handcuffs, and Officer Woodside did so immediately. Efforts to resuscitate Champion were unsuccessful, and he was pronounced dead when he arrived at the hospital.

The only factual discrepancies concern the alleged use of pepper spray and the application of pressure on Champion's back after he was handcuffed and the "hobble" restraint had been placed on his ankles. All three officers testified that they did not put pressure on Champion's back or press his face into the floor such that he could not breathe. Officer Woodside testified, "Not only did I not [lie across Champion's back, lie across his legs, or kick him], I

took extra care myself to make sure that Champion did not receive any injuries from the ground . . . [W]e knew we had a mental problem." Witnesses at the scene, however, testified that the officers did apply pressure on Champion's back while he was prone on the ground with his face towards the carpet. They testified that the officers were lying on Champion after he was down on the ground and restrained. Additionally, one witness testified that she "believe[d] there was another officer with his knee in the middle of [Champion's] back. . . ." Finally, another witness testified that "they were laying on him, like how wrestlers do in the ring, they were just all – upper body was on him, all their strength was on him."

As for the alleged use of pepper spray after Champion was restrained, the officers testified that Champion was not sprayed again with chemicals after he was on the ground. Paramedic Douglas Sleighter, who is extremely sensitive to pepper spray such that he feels its effects if it is sprayed near him or on another individual near him, testified that he did not detect any pepper spray on Champion while sitting next to him during the ambulance ride. However, witnesses at the scene testified that Officer Miller sprayed Champion while he was subdued on the ground and after he had stopped resisting.[5]

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[5] Respectfully, the Sixth Circuit erroneously ascribes the act of pepper spraying to all of "the Officers" (App.,14a, 17a). Notably absent, however, was any testimony that either Officer Dickhaus or Officer Woodside, who are both male, ever pepper-sprayed Champion after he was handcuffed. The witnesses only testified that "the female officer" or "she" sprayed Champion after he was handcuffed. Accordingly, Officers Dickhaus and Woodside should have not have been found liable for the alleged pepper spray application.

2. District Court Proceedings

Champion's father and sister filed action against an array of defendants, which included Officer Dickhaus, Officer Miller, and Officer Woodside. Only the claims brought pursuant to 42 U.S.C. § 1983 against the officers premised upon violations of Mr. Champion's rights under the Fourth Amendment (excessive force) and Fourteenth Amendment (failure to render medical assistance), however, survived the officers' initial motion to dismiss. Following discovery, the officers moved for summary judgment on qualified immunity grounds. The district court denied this motion (App., 37a-53a). "Taken in the light most favorable to the Plaintiffs, the facts indicate that these officers used more force than was necessary to restrain Mr. Champion. Thus, for purposes of qualified immunity, Plaintiffs have sufficiently established a Fourth Amendment violation (App., 44a)."

The case proceeded to trial. Before the jury retired, the officers moved for judgment as a matter of law on qualified immunity grounds, both at the close of plaintiff's proof and at the close of all the evidence. The motions were denied, and the jury found that the officers had violated Champion's constitutional right not to be subjected to excessive force, and it rendered verdicts against each of them for $300,000, as well as against Delelys and Outlook on the negligence claims asserted against them for $3.5 million (App., 31a-32a). The jury returned a verdict in the officers' favor on the 14th Amendment claim alleging failure to render medical care. The jury also did not award punitive damages.

After trial, the officers renewed their motion for judgment as a matter of law based on qualified immunity

grounds. The district court denied this motion (App., 33a-36a), "for the same reasons summary judgment was denied on this issue pursuant to the Memorandum [previously issued with the order denying summary judgment] (App., 35a). Based on the facts at trial, taken in the light most favorable to the Plaintiff, the officers' conduct violated the Plaintiff's constitutional right not to be subjected to excessive force and that right was clearly established at the time of the officers' conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (App., 35a)."

3. Decision of the Sixth Circuit Court of Appeals

On appeal, the Sixth Circuit affirmed the district court's decision that the officers were not entitled to qualified immunity (App., 30a). In considering this issue, the Sixth Circuit took the facts in the light most favorable to Plaintiff, which "assume[s] that the Officers la[id] on top of Champion, a mentally retarded individual who had stopped resisting arrest and posed no flight risk, and sprayed him with pepper spray even after he was immobilized by handcuffs and a hobbling device (App., 14a)." The Court then turned to the question of whether Champion's right to be free from this particular type of force was clearly established, and stated, "We have repeatedly stated that 'the right to be free from excessive force is a clearly established Fourth Amendment right (App., 16a).'" The Court then proceeded to cite a case where an arrestee was handcuffed too tightly, *Walton v. City of Springfield*, 995 F.2d 1331, 1342 (6th Cir. 2001), and cases where an arrestee was beaten or otherwise struck while restrained: *Phelps v. Coy*, 286 F.3d 295, 301 (6th Cir. 2002); *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988); *Lewis v. Downs*, 774 F.2d 711, 715 (6th Cir. 1985) (App., 16a-17a).

The Court then found that "[t]he particular type of physical force exerted against Champion was unreasonable, and the Officers should have been aware that they were violating Champion's rights (App., 17a)." In finding that it was clearly established that the use of pepper spray against Champion after he was handcuffed and hobbled was excessive, the Court pointed to one decision rendered before the incident in this case: *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994) (App., 17a).[6] Unlike the case *sub judice*, *Adams* involved an officer spraying mace on a blinded and incapacitated, non-violent arrestee seated in a vehicle. Plaintiff in *Adams* was a passenger in a vehicle that was stopped by an officer for emitting excessive fumes. *Adams*, 31 F.3d at 377. After Plaintiff was not able to produce identification, the officer subjected Plaintiff to two pat-down searches, which witnesses described as done in a manner to harass Plaintiff. *Id.* at 378. Throughout, witnesses testified that Plaintiff was not disorderly or violent and did not touch the officer. *Id.* at 378, 385-86. Plaintiff then started to walk away from the car and was ordered to stop by the officer. *Id.* at 378. When Plaintiff kept going, the officer ripped off Plaintiff's shirt and the officer sprayed mace in his face. *Id.* at 378, 380-82. Plaintiff turned around to get back in the car, and the officer sprayed mace

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[6] The other case cited by the Sixth Circuit, which was rendered after the incident here, was *Vinyard v. Wilson*, 311 F.3d 1340, 1348 (11th Cir. 2002) (App., 17a-18a). Other than *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994), the only case cited in *Vinyard* (rendered before the incident in this case) that found that the use of pepper spray after handcuffing was excessive was *LaLonde v. County of Riverside*, 204 F.3d 947, (9th Cir. 2000). *Vinyard*, 311 F.3d at 1348, n. 11. That case involved the gratuitous use of pepper spray following the uneventful arrest of the plaintiff therein for the "relatively minor offense" of disturbing the peace. *LaLonde*, 204 F.3d at 961.

in his face again because he refused to lie down and be handcuffed. *Id.* at 378, 380. The officer also derogatorily called Plaintiff "Spud." *Id.* at 380. The officer then continued to spray mace in Plaintiff's face after he was seated back in the car, could not see, and was incapacitated. *Id.* at 378, 380, 384-85. One witness testified that the spraying of mace lasted about six minutes. *Id.* at 382. It is against these facts that the *Adams* court found that spraying mace on Plaintiff once he was seated in the car, blinded and incapacitated, violated his right to be free from excessive force. *Id.* at 387.

In addition to *Adams*, the Sixth Circuit also found that the officers' training demonstrated that they were aware of Champion's clearly established right to be free from this type of excessive force because the officers were taught that pepper spraying a suspect after the individual is incapacitated constitutes excessive force (App., 18a).

The Sixth Circuit then went on to find that it is also clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force (App., 18a). In so finding, the Sixth Circuit cites three cases that predated the incident here (App., 19a).[7] The first case, *Simpson v.*

[7] The other two cases cited by the Sixth Circuit post-date the incident giving rise to suit here: *Deorle v. Rutherford*, 272 F.3d 1052 (9th Cir. 2001) and *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003) (App., 20a-21a). Moreover, *Deorle* involved the shooting of a mentally ill person, who had assaulted no one, had not posed a risk to the officers, and had complied with all of the police officers' instructions. *Deorle*, 272 F.3d at 1285. As for *Drummond*, this case involved a verbal, mentally ill person who repeatedly cried for air while officers

(Continued on following page)

Hines, 903 F.2d 400 (5th Cir. 1990), is a case from the Fifth Circuit that involved ten officers entering a cell and placing the inmate in a neckhold and sitting on the inmate's chest. While there was a report suggesting death was due to pressure on the inmate's chest, as stated in the Sixth Circuit's opinion (App., 19a), this was merely an alternative suggestion. *Simpson*, 903 F.2d at 403. Both the custodial death report and the medical examiner's report, in fact, stated that the inmate died as a result of trauma to the neck. *Id.* In any event, this case did not involve officers lying on a combative arrestee's back in an attempt to restrain him.

The other two cases cited by the Sixth Circuit were a district court opinion from the Western District of Michigan and a district court opinion from the Southern District of Ohio: *Swans v. City of Lansing*, 65 F.Supp.2d 625 (W.D. Mich. 1998) and *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013 (S.D. Ohio 1999) (App., 19a). *Johnson* concerned a failure to train claim brought against the City of Cincinnati, and *Swans*, unlike the case *sub judice*, involved the use of a "kick – stop restraint" mechanism on an arrestee, which is a method of restraining a prisoner with legs and arms tied behind the prisoner's back to a strap on the prisoner's waist. *Swans*, 65 F.Supp.2d at 633. The officers used the device on a prisoner, and one of them placed his foot and the weight of his body on the prisoner while the officers tightly bound the prisoner's feet and arms together. *Id.* at 634. Then, they left the prisoner alone face down, despite express directions from the manufacturer that users of the kick-stop restraint device should not

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continued to press their weight into the man's neck and torso while other officers stood around and laughed. *Drummond*, 343 F.3d at 1059.

place prisoners face down due to the risk of suffocation. *Id.* at 633-34. The officers returned only to replace the kick-stop restraint with handcuffs and chains when the kick-stop restraint broke because it had been applied so tightly. *Id.* at 634. The officers left the prisoner unmonitored again, and he died a short time later due to cardiac dysrythmia caused by postural asphyxia. *Id.*

In addition to the above-cited cases, the Sixth Circuit also found that the officers' training outlined the boundaries of excessive force and made it clear that lying on a suspect could cause asphyxiation (App., 19a).

Based on the foregoing, the Sixth Circuit found that the right to be free from the two types of force exerted used upon Champion was clearly established by the law of the Sixth Circuit and by the training of the officers (App., 21a). Following the issuance of the Sixth Circuit's opinion, the officers moved for a rehearing and a rehearing *en banc* to reconsider the denial of qualified immunity to them (App., 56a-67a). On November 2, 2004, the Sixth Circuit denied this motion (App., 54a-55a).

REASONS FOR GRANTING THE WRIT

The Court should grant this petition because the Sixth Circuit decision in this case conflicts with decisions of other courts and this Court that have held that qualified immunity protects officers from liability for Fourth Amendment violations unless it is clearly established in a particularized sense that the action violated Fourth Amendment rights. Moreover, the Sixth Circuit's opinion that it was clearly established that the officers' manner of restraining Champion was unlawful is contrary to every other circuit court that has considered the issue on similar

facts. Finally, the Sixth Circuit's application of the doctrine of qualified immunity to the facts of this case invites improper second-guessing of an officer's on-the-spot judgment and it effectively creates an atmosphere where officers will be remiss to even touch or lean against a combative arrestee after the arrestee is restrained, despite fears they may hold as to the arrestee's potential future actions.

1. The Sixth Circuit Has Construed the Doctrine of Qualified Immunity in a Manner That Conflicts with *Hope v. Pelzer*, 536 U.S. 730 (2002) and *Brosseau v. Haugen*, ___ U.S. ___, 125 S.Ct. 596 (2004).

The qualified immunity doctrine shields government officials from liability even if their conduct is ruled constitutionally impermissible, as long as their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine shields an officer from suit when he or she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances he or she confronted. *Saucier*, 533 U.S. at 206. Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Brosseau*, ___ U.S. ___, 125 S.Ct. at 599. As this Court recently stated:

> It is important to emphasize that this inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' (citation omitted).

> "[T]here is no doubt that *Graham v. Connor*,[], clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* [*v. Creighton*,] 'that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' (citation omitted) The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." (citation omitted).

Brosseau, ___ U.S. ___, 125 S.Ct. at 599.

The Sixth Circuit acknowledged this statement of the law, but then proceeded to ignore this requirement by relying on this Court's statement in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) that the existence of a "fundamentally similar" or "materially similar" case is not necessary for a right to be clearly established (App., 15a). It then proceeded to cite one case to find that Officer Miller had fair warning that her actions were unconstitutional: a case involving a verbal, compliant traffic offender, who was repeatedly maced outside the vehicle and then maced again while he was sitting in the vehicle, already blinded

and incapacitated (App., 17a).[8] Similarly, it found that the officers had fair warning that lying on Champion's back after he was restrained was unconstitutional by citing a case involving ten officers placing a prisoner in a neckhold and putting pressure on his chest, a case involving a prisoner placed in a "kick-stop restraint" mechanism, and a case involving a failure to train claim against a city (App., 19a).[9]

In rendering *Hope*, this Court did not dispense with the requirement that the contours of the right be clearly established in a particularized and relevant sense. While *Hope* does state that the relevant inquiry is whether the officer had "fair warning" and that such warning can exist even in the absence of a case with fundamentally similar facts, *Hope* clarifies that fair warning may sometimes not be found in general statements of the law. *Hope*, 536 U.S. at 740-41 (*citing*, *United States v. Lanier*, 520 U.S. 259, 269 (1997)). In such instances, a very high degree of prior factual specificity may be necessary. *Id.*

Consistent with the foregoing, this Court in its recent decision of *Brosseau*, in referencing *Hope*, stated that there need not be a materially similar case for the right to be clearly established where the violation of the constitutional right is obvious.[10] *Brosseau*, ___ U.S. ___, 125 S.Ct.

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[8] *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994) is fully discussed *infra*.

[9] *Simpson v. Hines*, 903 F.2d 400 (5th Cir. 1990), *Swans v. City of Lansing*, 65 F.Supp.2d 625 (W.D. Mich. 1998), and *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013 (S.D. Ohio 1999) are fully discussed *infra*.

[10] *Hope* involved an inmate who was handcuffed to a hitching post on two occasions, one of which lasted for seven hours without regular water or bathroom breaks. *Hope*, 536 U.S. at 734-35. Binding Eleventh

(Continued on following page)

at 599. Where the violation, however, is not obvious, it is necessary to ask whether, at the time of the officer's action, it was clearly established in a more particularized sense that the officer was violating a constitutional right. *Id.* In *Brosseau*, this Court found that the Ninth Circuit was mistaken in finding fair warning in the general tests set out in *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989) in a case involving an officer who shot a fleeing suspect in the back. *Id.* After stating that "[t]he present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision," this Court examined the cases cited by the parties. *Id.* Finding that this area is one in which the result depends very much on the facts of each case and that none of the cases squarely governed the case in front of it, this Court concluded that the cases did not clearly establish that Brosseau's conduct violated the Fourth Amendment, which caused his actions to fall in the "'hazy border between excessive and acceptable force.'" *Id.* at 600 (*citing*, *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

In a like vein, the present case is far from the obvious case where general excessive force cases and *Graham* can suffice. The factually dissimilar cases cited by the Sixth

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Circuit precedent proscribed handcuffing inmates to fences and cells for long periods of time, and depriving them of water. *Id.* at 742-43. This precedent, coupled with a relevant Alabama Department of Correction regulation and a Department of Justice report regarding constitutional infirmities in using the hitching post, was found to have sufficiently put the correctional officers on notice that handcuffing Mr. Hope to a hitching post for extended periods and depriving him of water and bathroom breaks constituted "cruel and unusual punishment" under the Eighth Amendment. *Id.*

Circuit did not provide fair warning to the officers here.[11] The Sixth Circuit's interpretation of *Hope* conflicts not only with *Hope* itself but also with this Court's recent decision in *Brosseau*.

Moreover, the Sixth Circuit further misinterprets *Hope* by finding that the officers' training clearly established the law here, notwithstanding the absence of any particularized case law clearly establishing that the officers' actions violated Champion's Fourth Amendment rights. In *Hope*, this Court found a relevant Alabama Department of Correction regulation and a Department of Justice report regarding constitutional infirmities in handcuffing an inmate to a hitching post put prison guards on notice, along with binding Eleventh Circuit precedent, that the handcuffing of an inmate to a hitching post for an extended period without regular water or bathroom breaks violated the inmate's clearly established right to not be subjected to "cruel and unusual punishment." *Hope*, 536 U.S. at 741-45. The Sixth Circuit references this portion of *Hope* and proceeds to find that qualified immunity should not be extended here because the officers were trained not to pepper spray a suspect after the individual is incapacitated (App., 19a-20a) and were informed that lying on a suspect could cause asphyxiation (App., 19a-20a). As for lying on a suspect,

[11] Moreover, as evidenced in the next section of this petition, other circuit courts in factually similar cases decided before the incident here had found that the officers' actions therein did not violate arrestees' constitutional rights. While this is obviously an area in which the facts will vary from case to case and no case is identical to another, the cases taken together, do suggest that the officers' actions here fall in the " 'hazy border between excessive and acceptable force' " that qualified immunity is designed to protect. *See Saucier*, 533 U.S. at 206.

Officer Dickhaus testified, "I believe our training was *once he is under control* we are to sit him up physically . . . ." and Officer Miller similarly testified that she was trained to sit up a prisoner who is face-down and handcuffed *once the prisoner is under control*. (emphasis added).

Unlike *Hope*, which dealt with concrete regulations and reports prohibiting specific types of punishment from being implemented in a prison setting, the training guidelines here involve a subjective component. They turn on whether a suspect is "incapacitated" or "under control" in the officer's mind. By finding these types of guidelines provide all the notice that the officer needs, the Sixth Circuit is employing hindsight to second-guess the perceptions of the officers on the scene. The Sixth Circuit relies on witnesses' accounts that Champion was under control after the handcuffs and hobble restraint were applied to justify its decision. However, the relevant inquiry – even accepting the witnesses' accounts – is whether the officers reasonably believed they had Champion under control, which includes not only whether Champion still has the potential to harm others – or himself.

Clearly, Champion was not incapacitated or under control when the officers arrived. It took significant effort from all three of them to contain him. Even after the officers handcuffed Champion and applied the hobble restraint to his ankles, he continued to kick while Officer Woodside tried to hold his legs. This continued resistance posed a risk of harm to the officers and to Champion himself. In addition, the officers, without the aid of the Mobile Crisis Response Team and Outlook counselors, were wrestling with what they should do with the mentally ill Champion, who had shown that he was certainly capable of violence. By finding that the officers' training

guidelines provided the officers with fair warning that their actions violated Champion's rights, the Sixth Circuit engaged in – and invited – precisely the sort of omniscient hindsight analysis that the doctrine of qualified immunity forbids.

In sum, the Sixth Circuit, under the auspices of *Hope*, summarily dismissed the need for any particularized case law clearly establishing that the officers' actions here violated Champion's Fourth Amendment rights, and it justified the denial of qualified immunity based on training that the officers received, training which, when implemented in the field, requires the use of the officers' judgment. The Sixth Circuit's misinterpretation of *Hope* and its attendant manipulation of the doctrine of qualified immunity beg this Court's intervention.[12]

2. The Sixth Circuit's Opinion That It Was Clearly Established That the Officers' Manner of Restraining Champion Was Unlawful Is Contrary to Every Other Circuit Court That Has Considered the Issue on Similar Facts.

As of April 30, 2000, there were no factually similar Supreme Court, Sixth Circuit or other circuit cases that

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[12] Moreover, other circuit courts in addition to the Sixth Circuit, as noted by several authors, are grappling with how to adhere and apply the *Hope* fair warning standard regarding clearly established law. *See e.g.*, "Unclearly Establishing Qualifed Immunity: What Sources of Authority May Be Used to Determine Whether the Law is 'Clearly Established' in the Third Circuit?", 47 Vill. L. Rev. 1221 (2002); "Hope v. Pelzer: The Supreme Court Revisits the Qualified Immunity Defense," 26 Am.. J. Trial Advoc. 643 (2003); "Qualified Immunity After Hope v. Pelzer: Is 'Clearly Established' Any More Clear?", 26 U. Ark. Little Rock L. Rev. 599 (2004).

could have put the officers on notice that their manner of restraining Champion was unlawful. In fact, a survey of factually similar cases reveals that other circuit courts have uniformly found that the officers' manner of restraining a combative arrestee was "objectively reasonable" in similar circumstances.

In *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 594 (7th Cir. 1997), Plaintiff's decedent was acting in a bizarre manner in a hotel, and police officers were summoned to restrain him. The officers struggled with him, they placed him face down on the floor, they handcuffed him, and one officer placed a knee on his back. *Id.* at 589. Another officer attempted to restrain his legs, and eventually a leg restraint had to be applied. *Id.* Tragically, he died, but the court held the officers did not violate his constitutional rights. *Id.*

Similarly, in *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996), police officers responded to a domestic call to find the decedent's grandmother complaining that her grandson had psychological problems, that he had stopped taking his medication, and that he needed to be taken to a hospital. *Id.* at 1488. Six officers became involved in a 20-25 minute struggle with the grandson, in which the officers had to use force to place him in handcuffs and leg restraints. *Id.* at 1488-89. The officers placed him face down on the floorboard of the rear seat of a patrol car, and one officer rode in back with him, but at some point during the 5-minute ride to the police station, the grandson succumbed to positional asphyxia. *Id.* The court granted the officers qualified immunity as to plaintiff's Fourteenth Amendment "custodial mistreatment" claim, and the Fourth Amendment use of force claim, finding no constitutional violations occurred. *Id.* at 1491-92.

In *Wagner v. Bay City*, 227 F.3d 316, 318 (5th Cir. 2000), plaintiff's decedent resisted arrest and was pepper sprayed. The officers then placed him face down on the ground, handcuffed him, and supposedly kept a knee on his back and kept his head down with a stick. *Id.* The facts were conflicting regarding how long he was on the ground, how roughly the officers treated him, how much pepper spray was used, and whether the officers dragged him and treated him aggressively after he stopped struggling. *Id.* at 321. In spite of this conflicting evidence, the court found the officers were protected by qualified immunity. The court found the officers' restraint to be "not objectively unreasonable, even where he subsequently died of asphyxiation." *Id.* at 324. The court found there was no "pre-existing law" which would have put the officers on notice that their conduct was unlawful. *Id.* at 323. The court examined case law discussing two applications of non-deadly force – pepper spray and a choke-hold – and found no "pre-existing law" indicating that they were objectively unreasonable. *Id.* at 324, n. 6. While *Wagner* was decided five months after the incident at issue in the instant case, it is notable that the court could not find a single case calling into doubt the legality of the method of restraint used by the officers in this case.

Given the facts of *Wagner*, this decision is especially important. The Sixth Circuit cites the Fifth Circuit of *Simpson v. Hines*, 903 F.2d 400 (5th Cir. 1990) as clearly establishing the law for Officers Dickhaus, Miller and Woodside (App., 19a). However, the Fifth Circuit, with facts in front of it similar to those in the case *sub judice*, did not find that its prior decision in *Simpson* clearly established the law for the officers involved in *Wagner*.

Finally, the Eleventh Circuit, in a very recent decision, found that a similar incident where officers employed a similar manner of restraint as that used in the case *sub judice* was not unlawful. *Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir. 2004) (per curiam). In *Garrett*, an individual succumbed to positional asphyxia after a protracted struggle with police during which he was pepper sprayed and "fettered." During the struggle, the officers "dove on top of [the suspect] to hold him to the ground." *Id.* at 1277. The court found that chemical spray, and the position into which he was placed (after an intense struggle) do not, of themselves, pose a high potential for death or serious bodily injury.[13] *Id.* at 1279-80. It then found that no Fourth Amendment violation occurred and went so far as to hold that even if a Fourth Amendment violation had occurred, on the day of the incident there was no "clearly established law" which would have informed an objectively reasonable officer that the amount of force used on Mr. Garrett constituted a Fourth Amendment violation. *Id.* at 1281.

In sum, there was no case law prior to April 30, 2000, which could have given the officers guidance as to whether their manner of restraint violated any "clearly established right" of Champion's. In fact, courts from other circuits have found that the manner of restraint employed by the officers here under similar factual circumstances was not unlawful. Thus, not only is the Sixth Circuit's decision in

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[13] In *Garrett*, as in the instant case, there was no expert proof whatsoever that the methods employed to restrain the individual carried with them a high risk of death or serious bodily harm. In fact, Dr. John Gerber, the medical examiner who performed Champion's autopsy, testified there is no evidence that pepper spray, even repeated applications of it, causes asphyxia.

conflict with other circuits, it wrested qualified immunity from the officers when the law was not sufficiently established to override their claim of qualified immunity.

3. This Case Has Significant Public Policy Implications for Law Enforcement

The facts of this case are a compelling demonstration of the reason for the qualified immunity doctrine. The officers here faced a 209-pound violent, mentally ill individual, who was non-verbal and non-responsive unbeknownst to them. Known to them, on the other hand, was the fact that he had assaulted his caregiver and a small child in a busy store parking lot and that he had just grabbed Officer Miller's throat. It took all three of them to contain Champion. Then, once contained, the officers continued to deal with a struggling, still combative non-verbal individual whose potential future actions were unknown.

This situation was not of the officers' making, but it became their situation to address without the help of the Mobile Crisis Response Team or the help of Outlook counselors. The Sixth Circuit patently acknowledged that the officers "undoubtedly faced unenviable choices in their interactions with Champion (App., 3a);" yet it denied qualified immunity. This decision does exactly what this Court has cautioned against: Courts should not substitute their personal notion of proper police procedure for the instantaneous decision of the officer at the scene acting under rapidly evolving circumstances. "The court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be

constructed five years after the fact." *Hunter*, 502 U.S. at 228.

In addition to improperly employing hindsight to judge the decisions of the officers here, the Sixth Circuit also lets the witnesses' accounts trump the officers' perceptions. Even accepting the witnesses' accounts as true, the relevant query for purposes of qualified immunity is whether the officers could have reasonably believed that Champion was still resisting or had the potential to still resist since he never communicated with them and they did not know that he could not communicate with them. It is certainly undisputed that Champion had the capacity to fiercely resist the officers and that he had just done so.

Finally, the Sixth Circuit's decision has serious implications for officers in the future who handcuff or otherwise restrain a combative, violent arrestee. Given the Sixth Circuit's denial of qualified immunity here, officers will be remiss to even touch or lean against a combative arrestee after the arrestee is restrained, despite fears they may hold as to the arrestee's potential future actions, including harm to himself. This defeats the purpose of qualified immunity. Qualified immunity should provide an "accommodation for reasonable error," and "'officials should not err always on the side of caution' because they fear being sued." *Hunter*, 502 U.S. at 229.

CONCLUSION

For the reasons stated herein, Officer Dickhaus, Officer Miller, and Officer Woodside respectfully request that the decision of the Sixth Circuit Court be summarily reversed in light of *Brosseau v. Haugen*, ___ U.S. ____, 125

S.Ct. 596 (2004), or alternatively, that the petition for writ of certiorari be granted.

Respectfully submitted,

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Calvin B. CHAMPION, et al.,
Plaintiffs-Appellees,

v.

OUTLOOK NASHVILLE, INC., et al.,
Defendants,

Debbie Miller, et al.,
Defendants-Appellants.

No. 03-5068.

United States Court of Appeals,
Sixth Circuit.

Argued: April 21, 2004.

Decided and Filed: Aug. 19, 2004.

G. Thomas Nebel, Law Offices of Tom Nevel, Nashville, TN, Johnnie L. Cochran, Jr., Thomas C. Marszewski (briefed), Cochran, Cherry, Givens, Smith & Montgomery, Chicago, IL, James D. Montgomery (briefed), Trent A. McCain (argued and briefed), Cochran, Cherry, Givens, Smith & Montgomery, Chicago, IL, for Plaintiffs-Appellees.

Francis H. Young (argued and briefed), Metropolitan Department of Law, Nashville, TN, for Defendant-Appellant.

Before: BATCHELDER and MOORE, Circuit Judges; CALDWELL, District Judge.*

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* The Honorable Karen K. Caldwell, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

KAREN NELSON MOORE, Circuit Judge.

The death of Calvin D. Champion ("Champion") shortly after being detained, restrained, and subdued by Nashville Police Officers presents us with a difficult issue of whether the Officers are entitled to qualified immunity such that we should reverse a jury verdict rendered against them. On April 30, 1999, Champion overwhelmed the facilities of his caregiver, promoting a response by the Nashville Police. Three Nashville Police Officers, Defendants-Appellants Debbie Miller ("Miller"), Richard Woodside ("Woodside"), and Craig Dickhaus ("Dickhaus") (collectively "Defendants" or "Officers"), subdued Champion with pepper spray and physical restraints. At trial, five different witnesses testified that after Champion was handcuffed and his feet were bound, the Officers continued to pepper spray Champion and to apply pressure to Champion's back as he lay on his stomach. Champion died en route to the hospital shortly after this incident. Champion's father, Calvin B. Champion, and Champion's sister, Jetonne Champion-Collins, (together "Plaintiffs"),[1] brought an action against the Officers pursuant to 42 U.S.C. § 1983. A jury awarded the Plaintiffs $900,000 in damages for Champion's physical and mental pain and suffering. Following the return of the verdict, the district court denied the Officers' motion for a judgment as a matter of law or a new trial or remittitur, in which they argued that they were entitled to qualified immunity and that the verdict was excessive.

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[1] Champion's father brought the action individually and as the personal representative of Champion's estate. Champion's sister was a plaintiff in her individual capacity only.

While the Officers undoubtedly faced unenviable choices in their interactions with Champion, they are not entitled to qualified immunity. Based upon the testimony presented at trial, the Officers' actions in this particular situation violated Champion's clearly established rights. Consequently, we AFFIRM the judgment of the district court, which upheld the jury's verdict.

I. FACTS AND PROCEDURE

A. Factual Background

The parties mostly agree on the anguishing series of events that culminated in Champion's death, but they differ with regards to the most crucial moments of the incident. Champion, who was 32 years old at the time of his death, completely lacked the ability to care for himself on account of his autism. He was nonresponsive and unable to speak. Outlook Nashville, Inc. ("Outlook"), which provided care for developmentally disabled individuals, was responsible for his well-being. On April 30, 2000, Jolene Delelys ("Delelys"), an Outlook employee, watched over Champion. Upon departing from a Nashville Babies 'R' Us store, where Delelys had taken Champion and her three-year-old son Devin, Champion began to have a "behavior." Delelys had neglected to seatbelt Champion, and Champion began to move around Delelys's minivan, hitting himself in the face and biting his hand, which was a type of "behavior" Champion frequently exhibited. Delelys stated that Champion was very agitated, "slapping his own head harder than usual, biting his own hand harder than usual, slapping the top of [Devin]'s head, shaking [Devin]'s hand." Joint Appendix ("J.A.") at 165.

Delelys stopped the van, fearing that Champion's behavior would further escalate. Delelys and Champion both exited the van. Champion grabbed Delelys's right hand and started to rub her hand all over his head, a response which, unbeknownst to Delelys, had helped Champion to calm down in the past. Delelys became frightened. She broke away from Champion and locked herself in the van, realizing she had lost control. Delelys tried to get help. She failed in her repeated attempts to call the Outlook emergency number. Finally, Delelys called 911. Right after she finished her phone call, Officer Debbie Miller appeared at the driver-side window, having been alerted to the developing problem by other Babies 'R' Us customers who had phoned 911. Delelys informed Miller that Champion was mentally ill, but Delelys did not tell Miller that Champion was nonverbal and nonresponsive.

Miller approached Champion, asking him for his name and to explain the reason for his agitation. Champion was hitting and biting himself as he began to approach Miller. Miller told Champion to stop, but Champion kept advancing towards Miller. Miller had walked backwards about fifty feet through the parking lot, retreating from Champion, when Champion grabbed Miller's shirt. Miller pushed Champion's hand away and delivered a short burst of pepper spray to Champion's face.

Champion walked dazedly into the Babies 'R' Us. Miller followed him into the store, and after a few minutes she touched him on the arm and ordered him to leave. Champion responded to this command, giving Miller the false impression that Champion actually understood her. Just as the two exited the store, Officer Richard Woodside arrived. Miller informed Woodside that Champion was "10-35" – police code for "mentally ill individual" – and

that she had previously sprayed Champion with pepper spray. Miller and Woodside attempted to arrest Champion outside the store, but the Officers struggled with Champion until Officer Craig Dickhaus arrived. The Officers decided to take Champion to the ground in the entrance foyer of the store, an area with carpeting. As Miller described it, "Woodside bends or squats down to where he has his arms wrapped around, a bear hug position if you will, of Champion's lower legs. And as Officer Dickhaus and myself step forward, we bring Champion down to his knees, and then from his knees we gently lay him from his knees, his knees to his stomach, and down on his chest to the ground." J.A. at 248.

Once on the ground Champion struggled. The Officers handcuffed Champion using two sets of handcuffs so as to allow Champion more movement. Champion continued to squirm and move around. Because Woodside had difficulty controlling Champion's feet, which were kicking high into the air, Miller and Dickhaus decided to restrain Champion further through the use of a "hobble device," which essentially binds an individual's ankles together. The Officers had difficulty putting on the hobble device because Champion was still kicking violently, but they eventually "hobbled" him.

The parties' divergent recounting of what occurred in the seventeen minutes between the application of the hobbling device and the arrival of the emergency medical technicians ("EMT") was one of the most significant factual issues at trial and is the axis around which this appeal revolves. The Plaintiffs have not suggested that the Officers acted improperly before Champion was handcuffed and hobbled. Indeed, the Plaintiffs' entire § 1983 claim is premised on the Officers' alleged use of pepper

spray and application of asphyxiating pressure after Champion's incapacitation. The parties disagreed during trial, and continue to diverge, in their respective understandings of how much force the Officers used after Champion was incapacitated on the ground.

After several minutes of being on the ground, Champion began to vomit. Woodside immediately called for an ambulance. Between Champion's first regurgitation and the arrival of the EMTs, Champion vomited two more times. Each time, according to the officers, Dickhaus and Miller pulled Champion back by the arms so that he would not be lying in his own vomit. They also checked Champion's mouth and nose to ensure that he was still breathing. The Officers reported that after vomiting, Champion was alert, blinking, breathing, and moving his head from side-to-side.

The EMTs entered the store shortly after Champion vomited for a third time. The first EMT to view Champion was Douglas Baggett ("Baggett"). Baggett testified that as he stepped over Champion, he noticed that Champion's legs moved a couple of inches, which gave Baggett the impression that Champion was alive. Then, Champion's "belly rose, his back rose up, and then he vomited," J.A. at 153 (Baggett Test.), such that Baggett thought he was watching Champion "take his last breath." J.A. at 154. Baggett failed to find a pulse on Champion and asked the Officers to remove the handcuffs, which they promptly did. Champion went into cardiac arrest; despite effort to resuscitate him, he was pronounced dead on arrival at the hospital.

All three Officers claim that none of them put pressure on Champion's back or pressed Champion's face into

the floor such that he could not breathe during this entire time period. *See* J.A. at 181, 185 (Dickhaus Test.); J.A. at 255-56 (Miller Test.) ("Not only did I not [lie across Champion's back, lie across his legs, or kick him], I took extra care myself to make sure that Champion did not receive any injuries from the ground. . . . [W]e knew he had a mental problem."); J.A. at 298 (Woodside Test.). Additionally, the Officers claimed that Champion was not sprayed again with chemicals after he was on the ground. J.A. at 185 (Dickhaus Test.); J.A. at 298 (Woodside Test.). Paramedic Douglas Sleighter, who is extremely sensitive to pepper spray such that he feels its effects if it is sprayed near him or on another individual near him, testified that he did not detect any pepper spray on Champion during the course of the ambulance ride.

However, five different lay witnesses testified that the Officers continued to sit or otherwise put pressure on Champion's back while he was prone on the ground with his face towards the carpet. J.A. at 156 (Ballenger Test.) (recalling that the Officers were lying on top of Champion); J.A. at 158 (Buford Test.) ("They were laying on him, like how wrestlers do in the ring, they were just all – upper body was on him, all their strength was on him."); J.A. at 228 (Jamerson Test.); ("I saw three officers on top of him."); J.A. at 230-31 (Martinez Test.) ("They were holding him down, laying on top of him after he was already down. . . . [T]hey are on top of him and with their elbows, and basically laying on top of him."); J.A. at 265 (Simpson Test.) ("I believe there was another officer with his knee in the middle of his back. . . ."). Additionally, these witnesses testified that the Officers continued to use pepper spray on Champion after he was subdued on the ground and had stopped resisting. J.A. at 156 (Ballenger Test.) ("[Champion]

turned his head to move and breathe . . . and the female officer maced him."); J.A. at 229 (Jamerson Test.) (testifying that Miller sprayed Champion twice and that Champion subsequently turned white); J.A. at 231-32 (Martinez Test.) ("Well, he was on the ground already and [Miller] maced him again after he was already handcuffed."); J.A. at 265 (Simpson Test.) ("He turned his face to breathe and then he got sprayed again."). All of these witnesses stated that they did not see Champion struggle during this time. There were some inconsistencies, however, in the witnesses' stories, particularly with regard to the length of time that various activities regarding Champion went on and the number of Officers who were lying on him after they brought him to the ground.

B. Procedural History

Plaintiffs filed their action on June 15, 2000. The complaint featured several different claims against an array of defendants, but most of the claims were dismissed, leaving only: 1) negligence claims against Outlook and Delelys; and 2) § 1983 claims against the three Officers premised upon violations of Champion's rights under the Fourth Amendment (excessive force) and Fourteenth Amendment (failure to render medical assistance). Following discovery, the government defendants filed a motion for summary judgment, alleging for the first time that qualified immunity insulated the Officers from liability. The district court ruled that the Officers were not entitled to qualified immunity and denied the Officers' motion for summary judgment. The Officers did not appeal this ruling.

The parties prepared for trial. On July 31, 2002, the Officers filed a motion in limine objecting to the inclusion of the testimony of the Plaintiffs' three experts, Michael F. Dorsey ("Dorsey"), Kris Sperry ("Sperry"), and Geoffrey Alpert ("Alpert"). The district court denied the motion in part, permitting Sperry and Alpert to testify.

The trial began on August 20, 2002. The jury heard contradictory testimony from the Officers, the witnesses, and several experts regarding the amount of force exerted against Champion, Champion's cause of death, and the level of pain and suffering Champion might have endured. Before the jury retired, the Officers filed a motion for a judgment as a matter of law, which was denied. The jury returned a verdict on August 29, 2002. It found Outlook and Delelys liable in the amount of $3.5 million for their negligence. The jury also found each police officer liable to the Plaintiffs in the amount of $300,000 each.

The Officers filed a combined post-verdict motion, renewing their motion for a judgment as a matter of law, or in the alternative, seeking a new trial or remittitur. The Officers based their renewed motion for judgment as a matter of law on qualified immunity. J.A. at 123. The district court denied the Officers' motion on November 21, 2002, ruling that "[b]ased on the facts at trial, taken in the light most favorable to the Plaintiff, the officers' conduct violated the Plaintiff's constitutional right not to be subjected to excessive force and that right was clearly established at the time of the officers' conduct." J.A. at 127-28 (Dist.Ct.Or.11/21/02). The district court also ruled that the $300,000 verdicts against the Officers were not excessive.

The Officers timely appealed several of the district court's rulings, including: 1) the order denying in part the motion for summary judgment; 2) the district court's ruling on Alpert's testimony; and 3) the denial of the Officers' motion for judgment as a matter of law, or in the alternative a new trial and/or remittitur.

II. ANALYSIS

A. Standards of Review

We evaluate the decisions of the district court through several different lenses. The Officers ask us to review both the denial of their motion for summary judgment and the denial of their motion for a judgment as a matter of law, which was initially filed before the jury retired pursuant to Federal Rule of Civil Procedure 50(a) and was renewed after the return of the jury's verdict pursuant to Rule 50(b). *See* Fed.R.Civ.P. 50(a)-(b). All of these motions concerned the Officers' alleged qualified immunity from liability. "[I]n cases where an appellant made a Rule 56 motion for summary judgment that was denied, makes those same arguments in a Rule 50(a) motion at the close of evidence that was also denied, lost in front of a jury, then renewed its arguments in a rejected Rule 50(b) motion after the entry of judgment, we will review only the denial of the Rule 50(b) motion." *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 174 (6th Cir.1996). "[R]eviewing a Rule 50 determination is preferable to reviewing a summary judgment decision because the Rule 50 decision is based on the complete trial record and not the incomplete pre-trial record available at summary judgment." *Id.* (quotation omitted).

Thus, we review de novo the denial of the Rule 50(b) motion, but our de novo review is narrowed by the test for evaluating a renewed Rule 50(b) motion. *Garrison v. Cassens Transp. Co.*, 334 F.3d 528, 537 (6th Cir.2003); *Monday v. Oullette*, 118 F.3d 1099, 1101 (6th Cir.1997). The Supreme Court has held,

> [I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.
>
> In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. . . . [A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150-51, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citations and quotations omitted). "The motion should be granted, and the district court reversed, only if reasonable minds could not come to a conclusion other than one favoring the movant." *Garrison*, 334 F.3d at 537-38 (quotation omitted).

Our review is further complicated by the underlying qualified immunity question. The issue of "whether qualified immunity is applicable to an official's actions is a question of law." *Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir.1996). "However, where the legal question of

qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability." *Pouillon v. City of Owosso*, 206 F.3d 711, 715 (6th Cir.2000) (quotation and ellipses omitted). Thus, to the extent that there is disagreement about the facts, such as whether the Officers put their body weight on Champion and pepper-sprayed him after he was handcuffed and hobbled, we must review the evidence in the light most favorable to the Plaintiffs, taking all inferences in their favor. We cannot weigh the evidence or make credibility assessments, and we are acutely aware that a jury, faced directly with the tasks we cannot undertake, believed the evidence presented by the Plaintiffs.

We employ a different method of review for the two other issues raised on appeal by the Officers. We review for an abuse of discretion the district court's denial of the Officers' post-trial motion for a new trial and/or remittitur filed pursuant to Federal Rule of Civil Procedure 59. *Gregory v. Shelby County*, 220 F.3d 433, 443 (6th Cir.2000). We also review for an abuse of discretion the district court's decision to allow Geoffrey Alpert's expert testimony. *Pride v. BIC Corp.*, 218 F.3d 566, 575 (6th Cir.2000).

B. Qualified Immunity

In actions involving the alleged abuse of government power, the defense of qualified immunity accommodates the tension between permitting litigants to recover damages, which is often "the only realistic avenue for vindication of constitutional guarantees," *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and the "social costs" of such suits, including "the expenses of litigation, the diversion of official energy from pressing

public issues, and the deterrence of able citizens from acceptance of public office." *Id.* Qualified immunity provides "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. 2727. We employ a three-step inquiry for determining whether qualified immunity is proper:

> *First*, we determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred. *Second*, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. *Third*, we determine whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.
>
> *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir.2003) (emphasis added) (quotation omitted). If the answer to all three questions is "yes," qualified immunity is not proper.

1. The Occurrence of a Constitutional Violation

First, we consider whether the facts, when taken in the light most favorable to the Plaintiffs, demonstrate the occurrence of a constitutional violation. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) ("Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's

conduct violated a constitutional right? This must be the initial inquiry."). This is a threshold question that often requires the setting forth of legal principles "which will become the basis for a holding that a right is clearly established." *Id.* "[*A*]*ll* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The test's "proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396, 109 S.Ct. 1865. To take the facts in a light most favorable to Plaintiffs is to assume that the Officers lay on top of Champion, a mentally retarded individual who had stopped resisting arrest and posed no flight risk, and sprayed him with pepper spray even after he was immobilized by handcuffs and a hobbling device. The use of such force is not objectively reasonable, as the Officers conceded at oral argument for the purposes of focusing on the question of whether Champion's right to be free from this particular type of force was clearly established.

2. A "Clearly Established" Right?

The first *Feathers* inquiry bleeds into the second question of whether the constitutional right was clearly established, which is the focus of the parties on appeal. "If the law at that time was not clearly established, an official could not . . . fairly be said to 'know' that the law forbade

conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Officials do not enjoy qualified immunity simply because the exact action in question has not previously been held unlawful by a court, but "in the light of pre-existing law the unlawfulness must be apparent." *Id.* In the excessforce context, it is not enough for a plaintiff to demonstrate that an officer's use of force exceeded the objective standard of reasonableness articulated in *Graham. Saucier*, 533 U.S. at 201-202, 121 S.Ct. 2151 (2001). Rather, qualified immunity is proper unless "it would be clear to a reasonable officer" that his use of excessive force "was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151.

The Supreme Court has refused to require that a plaintiff demonstrate the existence of a "fundamentally similar" or "materially similar" case. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). There can be "notable factual distinctions between the precedents relied on . . . so long as the prior decisions g[i]ve reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 740, 122 S.Ct. 2508 (quotation omitted). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741, 122 S.Ct. 2508. Moreover, the fact that various courts have "not agreed on one verbal formulation of the controlling standard" does not by itself

entitle an officer to qualified immunity. *Saucier*, 533 U.S. at 203, 121 S.Ct. 2151.

To demonstrate that the Officers unreasonably violated a clearly established right, the Plaintiffs must therefore show the prior articulation of a prohibition against the type of excess force exerted here. "In inquiring whether a constitutional right is clearly established, we must look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits." *Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir.2002). "[A]n action's unlawfulness can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs." *Feathers*, 319 F.3d at 848. Other sources can also demonstrate the existence of a clearly established constitutional right; in *Hope*, the Supreme Court considered Alabama state regulations and communications between the U.S. Department of Justice and the Alabama Department of Corrections as evidence that the corporal punishment at issue in *Hope* was clearly proscribed. *Hope*, 536 U.S. at 744-45, 122 S.Ct. 2508.

Our caselaw and the evidence presented at trial about the training that the Officers received demonstrate that the force exerted against Champion violated his clearly established Fourth Amendment rights. We have repeatedly stated that "the right to be free from excessive force is a clearly established Fourth Amendment right." *Neague v. Cynkar*, 258 F.3d 504, 507 (6th Cir.2001) (decided after *Saucier*). For example, we have articulated a clearly established right to be free from specific types of non-deadly excessive force, such as handcuffing an individual too tightly. *See Walton v. City of Southfield*, 995 F.2d 1331,

1342 (6th Cir.1993). We have also consistently held that various types of force applied after the subduing of a suspect are unreasonable and a violation of a clearly established right. *See, e.g., Phelps v. Coy*, 286 F.3d 295, 301 (6th Cir.2002) ("[T]here was simply no governmental interest in continuing to beat Phelps after he had been neutralized, nor could a reasonable officer have thought there was."); *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir.1988) ("[A] totally gratuitous blow with a policeman's nightstick may cross the constitutional line."); *Lewis v. Downs*, 774 F.2d 711, 715 (6th Cir.1985) ("The unprovoked and unnecessary striking of a handcuffed citizen in the mouth with a nightstick is clearly excessive.").

The particular type of physical force exerted against Champion was unreasonable, and the Officers should have been aware that they were violating Champion's rights. First, it is clearly established that the Officers' use of pepper spray against Champion after he was handcuffed and hobbled was excessive. In *Adams v. Metiva*, 31 F.3d 375 (6th Cir.1994), a plaintiff was sprayed with mace by authorities. *Id.* at 378. The police then handcuffed the plaintiff, placed him in his car, and according to the plaintiff and two witnesses, continued to spray mace in the plaintiff's face even though he was already blinded and incapacitated. *Id.* We held that this use of force was excessive, and we denied the officers qualified immunity because "[a] reasonable person would know that spraying mace on a blinded and incapacitated person . . . would violate the right to be free from excessive force." *Id.* at 387; *see also Vinyard v. Wilson*, 311 F.3d 1340, 1348 (11th Cir.2002) ("Courts have consistently concluded that using pepper spray is excessive force in cases where . . . the

arrestee surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else.").

In addition to prior precedent, the Officers' training demonstrates that they were aware of Champion's clearly established right to be free from this type of excessive force. The Officers were taught that pepper spraying a suspect after the individual was incapacitated constitutes excessive force. Sergeant Robert Allen, who testified about the training the Nashville Police Officers received, agreed that if Champion were handcuffed and hobbled, spraying him with pepper spray would be excessive.

Second, it also clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force. This appeal gives us no cause to consider whether leaving a bound suspect on his or her stomach without more constitutes excessive force that violates a suspect's clearly established Fourth Amendment rights. This is neither a "positional asphyxia" case nor a case in which the officers lightly touched or placed incidental pressure on Champion's back while he was face down. The asphyxia was caused by the combination of the Officers placing their weight upon Champion's body by lying across his back and simultaneously pepper spraying him.[2] Creating asphyxiating

[2] The Officers cite several cases that purportedly show that the application of pressure to a suspect's back while he or she is lying prone is not a clearly established constitutional violation. *See Wagner v. Bay City*, 227 F.3d 316, 323-24 (5th Cir.2000); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 594 (7th Cir.1997); *Cottrell v. Caldwell*, 85 F.3d 1480, 1488, 1491, 1492 (11th Cir.1996). However, all three cases are inapposite because they involve an arrestee whose positional asphyxia was caused solely as a result of the officers leaving the

(Continued on following page)

conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force. For example, in *Simpson v. Hines*, 903 F.2d 400 (5th Cir.1990), several police officers entered an inmate's cell, placed the inmate in a neckhold, and put strong pressure upon his chest. *Id.* at 403. The inmate died as a result, and a physician's report suggested that the inmate may have died as a result of the pressure placed upon his chest. *Id.* The Fifth Circuit denied qualified immunity to the officers, ruling that any reasonable officer would have known that the force exerted was excessive and thus constitutionally deficient. *Id.* Other district courts in our circuit have highlighted the dangers of putting pressure on a prone, bound, and agitated detainee. *Swans v. City of Lansing*, 65 F.Supp.2d 625, 633-34 (W.D.Mich.1998) (jury awarded verdict to a mentally ill arrestee who was hog-tied); *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013, 1019-20 (S.D.Ohio 1999) (finding that information existed in the law enforcement community, which put officers on notice of the dangers of positional asphyxiation).

Additionally, the Officers' training outlined the boundaries of excessive force and made clear that lying on a suspect can cause asphyxiation. All three Officers admitted that they were aware of the potential danger of putting pressure on an individual's back or diaphragm. J.A. at 187 (Dickhaus Test.) ("I believe our training was once he is under control we are to sit him up physically. . . ."); J.A. at 262 (Miller Test.). J.A. at 305 (Woodside

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arrestee on his or her stomach, but without applying pressure to the back. Because we are not confronted with such a situation, we need not decide whether such behavior violates a clearly established right.

Test.). Additionally, Sergeant Allen testified that he taught his officers that lying across an individual's back when that person is on his or her stomach increases the possibility of asphyxia. Just as the Supreme Court determined that the Alabama Department of Corrections Regulations and the communications between the U.S. Department of Justice and the State of Alabama put the state on notice about what constituted cruel and unusual punishment, so too here the training these Officers received alerted them to the potential danger of this particular type of excessive force. *See Hope*, 536 U.S. at 744-45, 122 S.Ct. 2508.

It cannot be forgotten that the police were confronting an individual whom they knew to be mentally ill or retarded, even though the Officers may not have known the full extent of Champion's autism and his unresponsiveness. The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted. *See Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir.2001) ("[W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining ... the reasonableness of the force employed."). For example, in *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir.2003), officers handcuffed a mentally ill individual and leaned their body weight onto his upper torso. *Id.* at 1054. The officers then applied a hobble device. Drummond fell into respiratory distress and eventually a coma. *Id.* at 1055. The court held that the district court's grant of summary judgment on the basis of qualified immunity was not proper because the officers had violated Drummond's clearly established rights. *Id.* at 1062. It stated, "*Any* reasonable officer should have known that such conduct constituted the use of excessive force."

Id. at 1061. *Drummond* postdated the events that led to Champion's death, but it relies on cases decided before April 30, 2000 (including the *Swans* case) and notes that when officers receive training explaining the dangers of asphyxia, they are on notice that applying pressure to an arrestee's back is objectively unreasonable.

Consequently, the right to be free from the two types of excessive force exerted against Champion was clearly established by the law of this circuit and by the training of the Officers. Either action by itself violated a clearly established right, and the combination of the actions bolsters the conclusion that no reasonable officer could believe that excessive force was not being used. We recognize that the Officers perhaps did not intend to harm Champion; indeed, they may have believed they were helping him. Such a consideration is immaterial, however, because the qualified immunity doctrine is an objective one; motive is irrelevant. The evidence presented in the light most favorable to Champion, and in the light accepted by the jury, demonstrates that the Officers unreasonably applied excessive force to Champion after he had been incapacitated in violation of Champion's clearly established rights. No reasonable officer would have continued to spray a chemical agent in the face of a handcuffed and hobbled mentally retarded arrestee, who was moving his or her head from side to side in an attempt to breathe, after the arrestee vomited several times. No reasonable officer would continue to put pressure on that arrestee's back after the arrestee was subdued by handcuffs, an ankle restraint, and a police officer holding the arrestee's legs.

The Officers concentrate their efforts on the evidence presented at trial that Champion may have died from a

preexisting medical condition unrelated to his treatment by the police and that the pepper spray was unlikely to contribute to Champion's vomiting or his death. In particular, the Defendants' medical expert, Dr. Wetli, testified that Champion's injuries were inconsistent with a death caused by Officers lying across Champion's back. J.A. at 284-86 (Wetli Test.). This evidence is unavailing for two reasons. First, the Plaintiffs presented contradictory evidence, and the jury believed the Plaintiffs' experts (and the witnesses who viewed the Officers lying on Champion's back) more than the Defendants' witnesses. Second, the Officers' argument sidesteps the point: even if Champion had not died, but had only been injured, his clearly established rights were no less violated.

3. Sufficiency of Evidence

Finally, the panel must determine "whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Feathers*, 319 F.3d at 848. As described in detail above, the Plaintiffs presented such evidence at trial. The fact that a jury found in his favor further underscores the sufficiency of the evidence.

4. Conclusion

In sum, all three *Feathers* inquiries have been answered in the affirmative. We therefore affirm the district court's denial of qualified immunity to the Officers.

C. The Verdict Amount

The Officers contend that they are entitled to a new trial, or at least a remittitur, because the jury award of $900,000 ($300,000 per Officer), which only compensates for Champion's physical and mental pain and suffering, is excessive. In essence, the Officers suggest that "a cumulative verdict of $900,000 against the Officers for at most a 17-minute period of physical and mental pain and suffering is excessive." Def. Br. at 38. Because the Officers ask us to undertake a Sissiphyean task of comparing Champion's pain and suffering to other forms of pain and suffering and because the award does not shock the conscience, we hold that the district court did not abuse its discretion in denying the Officers' motion.

We undertake a highly deferential review of the district court, which itself is sharply limited in its ability to remit a jury verdict. "[A] jury verdict should not be remitted by a court unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *Gregory v. Shelby County*, 220 F.3d 433, 443 (6th Cir.2000) (quotation omitted). Our remittitur standard favors maintaining the award, "[u]nless the award is (1) beyond the range supportable by proof or (2) so excessive as to shock the conscience, . . . or (3) the result of a mistake." *Bickel v. Korean Air Lines Co.*, 96 F.3d 151, 156 (6th Cir.1996) (quotation omitted) "A trial court is within its discretion in remitting a verdict only when, after reviewing all evidence in the light most favorable to the awardee, it is convinced that the verdict is clearly excessive, resulted from passion, bias or prejudice; or is so excessive or inadequate as to shock the judicial conscience of the court." *Gregory*, 220 F.3d at 443.

The Officers attempt to prove that the award shocked the conscience in two ways. First, they suggest that the medical evidence is insufficient to support a $900,000 award. Citing the testimony of both sides' medical experts, the Officers charge that Champion suffered only superficial abrasions and hemorrhaging, which would not have caused severe pain. Additionally, the experts portray Champion's death as being relatively peaceful by showing that any of the three potential, and possibly cumulative, causes of Champion's death – positional asphyxia, asphyxia resulting from gastric aspiration, or cardiac arrest prompted by Champion's angulated right coronary artery – would not have been particularly painful.

However, other testimony averred that Champion may have suffered physical pain. First, Plaintiffs' expert Dr. Gerber located a contusion on Champion's lung that may have resulted from pressure applied by the Officers. Second, the autopsy revealed evidence of "extensive aspiration of gastric contents," J.A. at 270 (Sperry Test.), which may have signaled that Champion was choking on his own vomit. Third, Dr. Gerber agreed that "someone suffering from positional asphyxia would be gasping for breath," which generates psychic pain stemming from anxiety and fear. J.A. at 221 (Gerber Test.).

The jury heard inconsistent evidence attesting to the level of Champion's pain. We do not attempt to measure it anew. No one but Champion can ever know the full amount of physical and mental pain and suffering experienced during his seventeen-minute ordeal, but the jury heard various and conflicting pieces of evidence and believed that Champion suffered. Their verdict does not lack an evidentiary basis, particularly given that the verdict encompassed not only physical pain, but also

mental pain and suffering. The panic of being unable to breathe and the pressure limiting one's breath cannot be discounted. *See* J.A. at 224-25 (Gerber Test.) (stating that from a physiological standpoint, an individual during asphyxiation would feel "fear, agitation and struggle; air hunger is something that causes fear"). Simply put, there is evidence sufficient to support the jury's award such that the district court did not err in denying the motion to remit the judgment.

Second, the Officers cite to several cases in which decedents received smaller awards for what the Officers construe as greater pain and suffering than that endured by Champion. Endeavoring to compare awards is difficult and often unfruitful, because the factual circumstances of each case differ so widely and because it places reviewing courts in the position of making awkward assessments of pain and suffering better left to a jury. *Layne v. Wal-Mart Stores, Inc.*, No. 00-5607, 2001 WL 1480736, at * 4 (6th Cir. Nov. 19, 2001) ("[C]omparable decisions are 'instructive' but 'not controlling' when we review for abuses of discretion."); *Thompson v. Nat'l R.R. Passenger Corp.*, 621 F.2d 814, 827 (6th Cir.1980) ("[C]ases involving similar injuries are in no sense controlling."). The Defendants cite several cases that they believe demonstrate the unconscionability of the award given the relatively brief period of his pain and suffering. *Compare Gregory*, 220 F.3d at 433-44 ($778,000 award not remitted when decedent was beaten horribly by a fellow prisoner and lay in his cell for ten hours before being discovered); *Tatum v. Land*, No. 95-6378, 1997 WL 85144, at (6th Cir. Feb. 26, 1997) ($600,000 award not remitted when decedent suffered severe injuries to shoulder, pelvis, and face as a result of a car accident and who survived for five hours after the accident); *with*

Sharpe v. City of Lewisburg, 677 F.Supp. 1362, 1365 (M.D.Tenn.1988) ($100,000 award for pain and suffering reduced after decedent was shot eight times and died within minutes of the shooting.). The plaintiffs respond by citing our decision in *Bickel*, when we affirmed the district court's denial of remittitur for several pain and suffering awards exceeding $1 million when the decedents, passengers on a Korea-bound plane attacked by the Soviet Union, "remained conscious during the twelve minute descent into the Sea of Japan, suffering the physical effects of decompression and recompression along the way, as well as the horror of knowing that death was imminent." *Bickel*, 96 F.3d at 155.

The Officers ask us to make an impossible comparison between Champion's pain and the pain of others. We cannot ascertain whether Champion's mental and physical pain and suffering, magnified by his likely inability to comprehend what was happening, equaled the pain and suffering of the airplane passengers plummeting out of the sky for twelve minutes in *Bickel* or the ten hours of slow death endured by the decedent in *Gregory*. Such comparisons are impossible and improper, because one cannot so mechanistically measure pain and suffering. In *Bickel*, we wrote: "It is impossible to determine the exact value of the pain and suffering which the decedents may have endured. . . . One simply cannot quantify the mental and physical pain and suffering such an experience would cause, and thus we cannot conclude that the evidence does not support the awards." *Id.* at 156. The award granted here by the jury, which was capable of judging credibility and actually heard live testimony regarding the incident as opposed to the written record before us, is not unreasonable, excessive, or conscience-shocking. We therefore

hold that the district court did not abuse its discretion in denying the Officers' motion for remittitur.

D. Alpert's Testimony

Finally, we evaluate the Officers' claim that the district court erred in permitting Alpert's expert testimony. The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), established the standard for admissibility of scientific expert testimony under Federal Rule of Evidence 702. The requirement that "any and all scientific testimony or evidence admitted [be] not only relevant, but reliable," *Id.* at 589, 113 S.Ct. 2786, "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93, 113 S.Ct. 2786. This test has also been applied to non-scientific expert testimony, such as Alpert's. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

The Officers argue that Alpert did not present any specialized knowledge that was reliable or of any assistance to the jury. The Officers rely principally on *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir.1994), in which we held that the plaintiff's expert, a so-called specialist in the field of "police policies and practices" was not qualified to speak about the city government's policy of disciplining officers for alleged uses of excessive force. *Id.* at 1348-54. In *Berry*, we stated that "there is no such 'field' as 'police policies and practices,'" mainly because we believed that the concept of such a field as presented by that "expert" was far too broad. *Id.* at 1352. We analogized to the legal

profession, stating that labeling the individual in *Berry* as an expert when he did not demonstrate that he had experience in any particular aspect of studying the police was "like declaring an attorney an expert in the 'law.'" *Id.* However, by reasoning that a divorce lawyer was no more an expert on patent law than anyone else, we implicitly recognized that individuals with specialized knowledge could most certainly serve as experts, i.e., patent lawyers can serve as experts in patent law. We did not hold that an individual cannot ever testify as an expert about some aspect of police affairs. Rather, the holding in *Berry* reasoned that unqualified individuals could not broadly testify about an area in which they possessed no specialized knowledge. While "police practices" in the broadest sense of the phrase may not be a field, surely criminology is.

Indeed, the chief reason for our decision in *Berry* was that the expert's credentials demonstrated that he had no specific expertise about police activities. He had limited experience, given that he was appointed as a deputy sheriff, a post that required almost no qualifications, and he had been fired twice from the position. Furthermore, he lacked any formal training or experience on the subject of criminology or police actions. Compounding the problem was his ungrounded and methodologically flawed testimony regarding what effect the City of Detroit's procedural shortcomings would have upon the future conduct of 5,000 police officers who would be confronted with a diverse and unpredictable array of situations in which force would be used. *See Dickerson*, 101 F.3d at 1163-64 (relying on the affidavit of a criminology professor, which opined that an officer used excessive force, in deciding that material fact issues remained regarding qualified immunity); *Estate of*

Boncher v. Brown County, 272 F.3d 484, 486 (7th Cir.2001) (recognizing implicitly the field of criminology by labeling the expert a reputable criminologist, but excluding expert's affidavit as useless because it was too general).

By contrast, the Plaintiffs' expert, Alpert, testified about a discrete aspect of police practices, namely use of excessive force, based upon his particularized knowledge about the area. In contrast to the expert in *Berry*, Alpert's credentials are much more extensive and substantial. Alpert has a PhD in sociology from Washington State University, is employed by the University of South Carolina's Department of Criminology, teaches classes on police procedures and practices, has been involved with federal research funded by the Department of Justice that evaluates the use of force by officers, trains officers in the use of force, works with police departments to create use-of-force policies, has testified before Congress and state legislatures about police policies, and has authored forty to fifty articles on the subject of police procedures, many of which have appeared in peer-reviewed journals. Alpert Test., Transcript Vol III at 428-32 (Attached to Motion to Take Judicial Notice). Unlike the expert in *Berry*, Alpert testified about much more specific issues: the continuum of force employed by officers generally, the specific training the Officers received, and Alpert's opinion that if the witnesses' testimony is credited, the Officers' actions violated nationally recognized police standards governing excessive force. The critical difference between testifying about the impact of police policies upon a large group of officers and testifying about the proper actions of individual officers in one discrete situation highlights the inapplicability of *Berry*. Courts have permitted experts to testify about discrete police-practice issues when those experts

are properly credentialed and their testimony assists the trier of fact. *See Dickerson*, 101 F.3d at 1163-64; *Kladis v. Brezek*, 823 F.2d 1014, 1019 (7th Cir.1987). Because Alpert had considerable experience in the field of criminology and because he was testifying concerning a discrete area of police practices about which he had specialized knowledge, we hold that the district court did not abuse its considerable discretion in admitting Alpert's testimony.

III. CONCLUSION

We AFFIRM the rulings and judgment of the district court. First, the district court properly denied the Officers' Rule 50(b) motion for qualified immunity, because on a view of the facts in the light most favorable to the Plaintiffs, the Officers violated Champion's clearly established right to be free from the specific types of forces administered after Champion was subdued and restrained. Second, the district court did not abuse its discretion in denying the Officers' motion to remit the size of the pain-and-suffering award because the award was supported by evidence and it did not shock the conscience. Third, the district court did not abuse its discretion in admitting Alpert's testimony. We AFFIRM.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

JUDGMENT IN A CIVIL CASE

Calvin Champion	)	
VS.	)	CASE #3:00-0568
Outlook Nashville, Inc., et al.	)	

- **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

- **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that upon the jury verdict for the plaintiff, judgment is hereby entered against Defendants Outlook Nashville, Inc. and Jolene Delelys in the amount of $3,500,000.00; against Defendant Debbie Miller in the amount of $300,000.00; Defendant Richard Woodside in the amount of $300,000.00; and Defendant Craig Dickhaus in the amount of $300,000.00.

Thereupon the jury was polled and each juror affirmed the verdict as being his or her individual verdict.

August 29, 2002
DATE

ROGER A. MILAM, CLERK

/s/ Doris E. Bush
BY DORIS E. BUSH
DEPUTY CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CALVIN B. CHAMPION, individually and as personal representative of the Estate of Calvin D. Champion, Deceased and JETONNE CHAMPION-COLLINS	)	NO. 3:00-0568 JUDGE CAMPBELL
v.	)	
OUTLOOK NASHVILLE, INC., et al.	)	

ORDER

Pending before the Court are Defendants Outlook Nashville, Inc. and Jolene Delelys' Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Remittitur (Docket No. 202) and Defendants Miller, Woodside and Dickhaus' Motion for Judgment as a Matter of Law or For a New Trial (Docket No. 205). The Motions are DENIED.

All Defendants have moved, pursuant to Fed. R. Civ. P. 50 and 59, for judgment as a matter of law and for a new trial. The Defendants have also moved for remittitur of damages.

The Motion for Judgment as a Matter of Law on the § 1983 claims is denied because Defendants have not demonstrated that reasonable minds could not differ as to the conclusions to be drawn from the evidence. *Paschal v. Flagstar Bank*, 295 F.3d 565, 582 (6th Cir. 2002). The Motion for Judgment as a Matter of Law on the state law claims is likewise denied because Defendants have not

demonstrated that a reasonable mind could draw but one conclusion from the facts at trial. *Mosley v. Kelly*, 65 F. Supp.2d 725, 728-29 (ED. Tenn. 1999). The Motions for New Trials are denied because the verdicts and damages are such that the jury could reasonably have reached them, *Wayne v. Village of Sebring*, 36 F.3d 517, 525 (6th Cir. 1994). The Motion for Remittitur is denied because the damages awarded were not excessive taking the facts in the light most favorable to the Plaintiff.

Plaintiff presented evidence from which the jury could reasonably conclude that Defendants Outlook Nashville and Delelys negligently and proximately caused Calvin Champion's death. The jury's verdict was supported by sufficient evidence as to negligence, proximate cause and damages. The Court is satisfied that the jury instructions accurately stated the law regarding the Defendants' duties to the Plaintiff and that the verdict forms were appropriate.

Neither a new trial nor remittitur is required in this case based on the amount of damages awarded. The $3.5 million verdict against Outlook Nashville and Delelys is supported by the evidence and is not excessive. The $300,000 verdicts against Defendants Miller, Woodside and Dickhaus likewise are not excessive, taking the facts in the light most favorable to the Plaintiff. The damages awarded by the jury do not clearly exceed the maximum amount which the jury could reasonably find to be compensatory for the Plaintiff's loss. *Bickel v. Korean Air Lines Co.*, 96 F.3d 151, 156 (6th Cir. 1996). The damages awarded are supported by the proof and do not shock the conscience or result from mistake. The damages are not speculative or the product of passion, prejudice, outrage or caprice. Whether or not the Court sits as a "thirteenth"

juror on the state law claims as the parties have debated, the amount awarded against Defendants Outlook Nashville and Delelys is reasonable based on the facts in the case. There was no mistake in the calculation of the damages awarded against the Officer Defendants. The jury was specifically charged that the total damages in the case would be arrived at by adding up all the dollar numbers and that the jury should not arrive at a total amount of damages and then repeat that total number in the damages blanks on the verdict forms.

The Motion for Judgment as a Matter of Law based on qualified immunity by Defendants Miller. Woodside and Dickhaus is denied for the same reasons summary judgment was denied on this issue pursuant to the Memorandum (Docket No. 111) of December 21, 2001. Based on the facts at trial, taken in the light most favorable to the Plaintiff, the officers' conduct violated the Plaintiff's constitutional right not to be subjected to excessive force and that right was clearly established at the time of the officers' conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Plaintiff produced evidence at trial that the Defendant officers used excessive force against Calvin Champion after he was handcuffed and hobbled and that such excessive force violated applicable standards, training and clearly established law.

The bottom line in this case is that there were disputed facts from which a jury could have ruled either for the Plaintiff or the Defendants. The jury ruled for the Plaintiff. Having done so, the jury awarded a reasonable amount of damages based on all the evidence.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CALVIN B. CHAMPION, et al.	)	
v.	)	No. 3-00-0568
	)	JUDGE CAMPBELL
OUTLOOK NASHVILLE, INC., et al.	)	

ORDER

Pending before the Court is a Motion For Summary Judgment filed by Defendants Metropolitan Government, Miller, Dickhaus and Woodside (Docket No. 67). For the reasons set forth in the accompanying Memorandum, the Motion is GRANTED in part, and DENIED in part.

This case is returned to the Magistrate Judge for further customized case management.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CALVIN B. CHAMPION, et al.	)	
v.	)	No. 3-00-0568
	)	JUDGE CAMPBELL
OUTLOOK NASHVILLE, INC., et al.	)	

MEMORANDUM

I. Introduction

Pending before the Court is a Motion For Summary Judgment filed by Defendants Metropolitan Government, Miller, Dickhaus and Woodside (Docket No. 67). For the reasons set forth below, the Motion is GRANTED in part, and DENIED in part.

This case is returned to the Magistrate Judge for further customized case management.

II. Factual and Procedural Background

Plaintiffs Jetonne Champion-Collins, sister of Calvin D. Champion, who is deceased, and Calvin B. Champion, the representative of the estate of Calvin D. Champion. allege in this suit that the Defendants Outlook Nashville, Inc., Jolene Delelys, the Metropolitan Government of Nashville and Davidson County, the Nashville Metropolitan Police Department, Officer Debbie Miller, Officer Richard Woodside, and a John Doe police officer (since

identified as Craig Dickhaus), are responsible for the death of Calvin D. Champion. (Complaint (Docket No. 1)).[1] Specifically, Plaintiffs allege that Calvin D. Champion. who was autistic and mentally disabled, was under the custody, care and control of Defendant Outlook Nashville, Inc., and that on April 30, 2000, Defendant Delelys, an Outlook employee assigned to act as Mr. Champion's personal companion, drove Mr. Champion and Delelys' 3-year old son to a store named Babies "R" Us. (*Id.*, at ¶¶ 12-15). According to the Complaint, Defendant Delelys left Mr. Champion in the vehicle while she and her son went inside the store, which caused Mr. Champion to become nervous and agitated. (*Id.*, at ¶ 16), Plaintiffs allege that Defendant Delelys returned to the vehicle with her son, and after traveling a short distance, stopped and took Mr. Champion out of the vehicle, got back into the vehicle and locked the doors, leaving Mr. Champion alone outside. (*Id.* at ¶¶ 17-18).

Plaintiffs allege that Mr. Champion, who could not interact or communicate with other individuals on his own, wandered around the vehicle in a general state of distress. (*Id.*, at ¶¶ 18-19). Defendant Miller allegedly approached Mr. Champion at this point and, in an effort to seize him, sprayed Mr. Champion in the face and eyes with pepper spray. (*Id.*, at ¶¶ 19-20).

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[1] Through a previous Memorandum and Order (Docket Nos. 31, 32), the Court dismissed the following claims: the official capacity claims against Defendants Miller, Woodside and Doe/Dickhaus; the punitive damages claim against the Metropolitan Government; Plaintiffs' individual section 1983 claims; and the TGTLA claim. In addition, the Metropolitan Nashville Police Department was dismissed as a Defendant. (*Id.*)

According to the Complaint, Mr. Champion then walked into the Babies "R" Us store, rubbing his face and eyes, and was approached by Officers Miller, Woodside and a John Doe officer, since identified as Craig Dickhaus. (*Id.* at ¶¶ 21-22). At that time, the officers again sprayed Mr. Champion in the face and eyes with pepper spray, forced him to the ground on his stomach, handcuffed his hands together behind his back, and tied his feet together. (*Id.* at ¶¶ 22-23). While lying on his stomach in the presence of the officers and Defendant Delelys, Mr. Champion allegedly struggled to breath, aspirated dark pink liquid from his mouth, asphyxiated and died. (*Id.* at ¶¶ 24-25).

Plaintiffs allege that Defendants Miller, Woodside and Doe violated the Fourth Amendment by engaging in excessive force in their encounter with Mr. Champion, violated the Fourteenth Amendment through their deliberate indifference to the medical needs of Mr. Champion, and violated Plaintiffs' rights to equal protection and due process. The Complaint alleges that negligence, and an official pattern, practice or custom of the Metropolitan Government led to Plaintiffs' injuries. Plaintiffs assert an Americans With Disabilities Act, 42 U.S.C. § 12132 ("ADA") claim against the Defendant officers and the Metropolitan Government. Plaintiffs also allege that Mr. Champion's death was a direct and proximate result of the negligence of Defendants Outlook Nashville, Inc. and Delelys.

III. Analysis

A. The Standards for Considering Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In order to prevail, the movant has the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). In determining whether the movant has met its burden, the Court must view the evidence in the light most favorable to the nonmoving party, *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In order to defeat the motion, the nonmoving party is required to show, after an adequate time for discovery, that there is a genuine issue of fact as to every essential element of that party's case upon which he will bear the burden of proof at trial. *Celotex Corp.*, 106 S.Ct. at 2553. In order to create a genuine factual issue, the nonmoving party must show there is sufficient evidence favoring the nonmoving party for the factfinder to return a verdict for that party, *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Although the nonmovant need not show that the disputed issue should be resolved in his favor, he must demonstrate that there are genuine factual issues that "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.*

B. Qualified Immunity

The individual defendants argue that they are entitled to qualified immunity on Plaintiffs' Section 1983 claims. Under the qualified immunity doctrine, "government officials who perform discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

In a recent opinion, the Supreme Court made clear that in considering the issue of qualified immunity, it is important that courts apply, in the proper sequence, what has become a two-part qualified immunity analysis. *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). The first inquiry is whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right . . . " *Id.* If a violation could be established on a favorable view of the parties' submissions, "the next, sequential step is to ask whether the right was clearly established." *Id. See also LeMarbe v. Wisneski*, 266 F.3d 429, 434 (6th Cir. 2001).

In this case, Defendants argue that Plaintiff cannot establish a Fourth Amendment excessive force claim, or that the officers failed to comply with a duty to render medical aid, because the officers acted reasonably during their encounter with Mr. Champion. To establish an excessive force claim under the Fourth Amendment, a plaintiff must show that the officer's actions were objectively unreasonable without regard to their underlying intent or motivations. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989); *Saucier*,

121 S.Ct. at 2158; *Vaughn v. City of Lebanon*, 2001 WL 966279 (6th Cir. Aug. 16, 2001). Determining whether the officer's actions were reasonable requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 109 S.Ct. at 1872.

As discussed above, qualified immunity analysis requires the Court to determine whether the facts alleged, taken in the light most favorable to the Plaintiffs, show the Defendants engaged in excessive force. Defendants argue that every step taken by the officers was reasonable, relying on the officers' version of what took place at the scene. Plaintiffs vigorously dispute, however, the officers' version of events.

To support their claims, Plaintiffs have submitted numerous statements of bystander witnesses, most of which were apparently taken by police detectives investigating the incident or by a private investigator. Defendants contend that the Court cannot consider these unsworn statements. Even if the Court disregards these statements, however, the Plaintiffs have filed reports of two experts, Geoffrey P. Alpert, Ph.D. and Kris Sperry, M.D., which opine that the officers' actions were not consistent with standard officer training and led to Mr. Champion's death. (Exhibits A and B to Plaintiffs' Sur-Response In Opposition To Defendants' Motions For

Summary Judgment; Exhibits 28 and 29 to Notice Of Filing (Docket No. 89)).[2]

Taken in the light most favorable to the Plaintiffs, the facts indicate that these officers used more force than was necessary to restrain Mr. Champion. Thus, for purposes of qualified immunity, Plaintiffs have sufficiently established a Fourth Amendment violation.

As for Plaintiffs' claim that the officers failed to render medical attention, the Defendants argue that this claim is also governed by a Fourth Amendment reasonableness standard, citing the Seventh Circuit's decision in *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 595-96 (7th Cir. 1997) to support their argument. In *Phillips*, the Seventh Circuit held that a claim that police officers failed to render medical assistance during an arrest should be governed by the Fourth Amendment because the police action complained of occurred during the course of the plaintiff's seizure and the Fourth Amendment requires that seizures be reasonable. *Id. But see Wagner v. Bay City, Texas*, 227 F.3d 316, 324-25 (5th Cir. 2000) (Deliberate indifference standard used to analyze claim of denial of medical care during arrest and ride in patrol car); *Tagstrom v. Enockson*, 857 F.2d 502, 504 (8th Cir. 1988) (Claim that officer failed to render medical assistance to

[2] Defendants argue that the experts' opinions should be excluded under Rule 702 of the Federal Rules of Evidence because they are not qualified to give such opinions. Defendants have not filed a separate motion to exclude the testimony of these experts, however, and the Court is persuaded that their statements are sufficient for purposes of Rule 56. Defendants may, of course, file an appropriate motion to exclude the testimony of the experts at trial.

injured subject of motorcycle chase analyzed under "deliberate indifference" standard).

Plaintiffs point out that a deliberate indifference standard has been applied by other courts to failure to render medical aid claims, but argue that the officers are also liable under the less rigorous reasonableness standard. Thus, for purposes of summary judgment, the Court will apply the Fourth Amendment reasonableness standard to Plaintiffs' failure to render medical attention claim.

Defendants argue that the undisputed facts show that the officers were reasonable in concluding that Mr. Champion did not need medical assistance beyond their calling an ambulance after he vomited for the first time after he was placed in handcuffs. On the other hand, Plaintiffs' expert, Dr. Sperry, states in his report that the officers acted unreasonably in continuing to restrain Mr. Champion in a prone position after he vomited and by failing to monitor him adequately. (Exhibit B to Plaintiffs' Sur-Response; Exhibit 29 to Notice Of Filing (Docket No. 89)). In addition, Plaintiffs have submitted certain General Orders of the Metropolitan Police Department, which Officer Miller identified in her deposition, that require an officer or others to administer first aid if an individual sustains injuries during a use of force incident or if an individual complains of unusual symptons after being sprayed with chemical spray. (Exhibit 36 to Notice Of Filing (Docket No. 89)). The Orders also contain warnings against using hobble restraints, leg shackles, plastic ties, or any other device to place any subject in a manner which is likely to produce positional asphyxia, the condition that caused Mr. Champion's death. (*Id.*)

The Court is persuaded that, taken in the light most favorable to the Plaintiffs, the officers, were unreasonable in failing to render medical attention to Mr. Champion. Thus, for purposes of qualified immunity, Plaintiffs have sufficiently established a constitutional violation.

As for the second inquiry in the qualified immunity analysis, Defendants have not seriously questioned that the rights allegedly violated were clearly established. Therefore, the Court finds it unnecessary to address this issue. Defendants are not entitled to summary judgment on Plaintiffs' excessive force and failure to render medical assistance claims.

C. Failure to Train Claim Against Metro

Defendant Metropolitan Government argues that it is entitled to summary judgment because Plaintiffs have failed to create a genuine factual dispute that it failed to properly train the Defendant officers. In *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989), the Supreme Court held that "the inadequacy of police training may serve as the basis for section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came into contact." *See also Brown v. Shaner*, 172 F.3d 927, 930-31 (6th Cir. 1999). The Court identified two situations that would satisfy the deliberate indifference standard: (1) Where failure to provide adequate training in light of foreseeable consequences that could result from the lack of instruction; and (2) Where the city fails to act in response to repeated complaints of constitutional violations by its officers. *Canton*, 109 S.Ct. at 1205-06; *Brown*, 172 F.3d at 931.

To support their failure to train claim, the Plaintiffs rely almost exclusively on the opinion of their expert, Dr. Michael F. Dorsey. Dr. Dorsey's Report does not, however, indicate that he is familiar with the type of training received by the Defendant officers. Instead, Dr. Dorsey assumes a lack of training from the actions of the officers during the incident in question. For example, he states: "Officer Miller's behavior during the initial confrontation . . . clearly demonstrates either a lack of appropriate training and/or a lack of sensitivity to persons suffering from such disabilities." (Report of Michael F. Dorsey (attached as Exhibit 27 to Notice Of Filing (Docket No. 89)). At another point in his Report, he states: "It is clear that Officers Miller, Woodside and Dickhaus were either poorly trained or chose to ignore the risks associated with positional asphyxia." (*Id.*)

Under these circumstances, the Court concludes that Plaintiffs have failed to demonstrate the existence of a genuine factual dispute on the failure to train claim, and Defendant Metropolitan Government is entitled to summary judgment on this claim.

D. ADA Claims

Defendants argue that they are entitled to summary judgment on Plaintiffs' ADA claims. First, Defendants argue that the individual Defendants cannot be held liable under the ADA. See *Sullivan v. River Valley School District*, 197 F.3d 804, 808 n.1 (6th Cir. 1999). In their Response, Plaintiffs concede that no personal liability exists under the ADA. Accordingly, the individual Defendants are entitled to summary judgment on Plaintiffs' ADA claims.

In a previous opinion addressing Defendants' Motion To Dismiss, the Court discussed the Plaintiffs' ADA claims as follows:

> Defendants argue that Plaintiffs' ADA claim should be dismissed for failure to state a cognizable claim. Plaintiffs' ADA claim is based on Section 12132, which provides as follows:
>
> > Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.
>
> 42 U.S.C. § 12132. Defendants contend that the overwhelming majority of courts have held that an arrest is not subject to this provision.
>
> As the Tenth Circuit explained in *Gohier v. Enright*, 186 F.3d 1216, 1220-21 (10th Cir. 1999), the federal courts have addressed ADA claims arising from arrests under two different theories. Under one theory, the police wrongfully arrest someone with a disability because they misperceived the effects of that disability as criminal activity. *Id.*, at 1220 (Citing *Lewis v. Truitt*, 960 F.Supp. 175 (S.D. Ind. 1997); *Jackson v. Inhabitants of the Town of Sanford*, 1994 WL 589617 at *6 (D.Me. Sept. 23, 1994)). Under the second theory, the plaintiff alleges that, although the police arrested him for a crime unrelated to his disability, they failed to reasonably accommodate his disability in the course of investigation or arrest. 186 F.3d at 1220-21 (Citing *Gorman v. Bartch*, 152 F.3d 907, 912-13 (8th Cir. 1998); *Rosen v.*

Montgomery County, Maryland, 121 F.3d 154, 157 (4th Cir. 1997); *Patrice v. Murphy*, 43 F.Supp.3d 1156, 1159 (W.D. Wash. 1999).

Under the first theory, several courts have held that a plaintiff may state an ADA claim that he was discriminated against by being arrested because of his disability. *See, e.g., Lewis*, 960 F.Supp. at 178-79 (Summary judgment on ADA claim denied where plaintiff's alleged arrest for "refusing law enforcement" was based on his inability to comply with officers' instructions because plaintiff was deaf); *Barber v. Guay*, 910 F.Supp. 790, 802 (D.Me. 1995) (Summary judgment on ADA claim denied where plaintiff alleged that he was denied fair treatment due to his psychological and alcohol problems); *Jackson*, 1994 WL 589617, at *6 (Plaintiff who was disabled by a stroke mistakenly arrested for drunk driving). *See also Patrice*, 43 F.Supp.2d at 1159-60 (recognizing the first theory, but dismissing claim because plaintiff's alleged failure to reasonably accommodate (second theory), rather than discriminate as cause of arrest).

In addressing the second theory, however, some courts have suggested that an arrest is not the type of service, program, or activity from which a disabled person could be excluded or otherwise denied a benefit. *See, e.g., Patrice v. Murphy*, 43 F.Supp.3d at 1159. On the other hand, the Eighth Circuit has held that the ADA requires police to reasonably accommodate a person's disability in providing post arrest transportation. *Gorman*, 152 F.3d at 911-913. In addition, courts have held that a police department should reasonably accommodate a deaf person in its investigation and incarceration after arrest. *See Calloway v. Boro Of Glassboro Department of*

Police, 89 F.Supp.2d 543, 554-56 (D.N.J. 2000) (ADA requires police department to reasonably accommodate deaf individual during investigative questioning at the station house); *Hanson v. Sangamon County Sheriff's Department*, 991 F.Supp. 1059, 1062-63 (C.D. Ill. 1998) (ADA requires police department to reasonably accommodate deaf individual by allowing him to use hearing impaired telephone equipment or other means through which he could communicate with friends or relatives in order to post bond).

As for ADA "reasonable accommodation" claims alleging that a government entity failed to properly train its police officers to recognize disturbances that are likely to involve persons with mental disabilities, and to investigate and arrest such persons in a manner reasonably accommodating their disability claim, courts disagree as to the viability of those claims. In *Gohier*, 186 F.3d at 1222, the Tenth Circuit suggested that such a claim could be viable. In a recent case, however, the Fifth Circuit held, in a case involving a plaintiff who was shot by a police officer investigating a 911 call, that the ADA does not apply "to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). Once the area is secure and there is no threat to human life, however, the officers "would have been under a duty to reasonably accommodate [the plaintiff's] disability in handling and transporting him to a mental health facility." *Id.* at 802.

> In this case, the facts alleged by Plaintiffs potentially fit within both theories: wrongful arrest because of a disability and failure to accommodate a disability after arrest. Although they do not use the language of the cases cited above, Plaintiffs essentially allege that the Defendant officers wrongfully arrested Mr. Champion because of his disability, and thereafter, failed to accommodate his disability in handling him. The Court construes the Complaint as alleging both theories, and at this stage of the proceedings, denies Defendants' motion to dismiss for failure to state a claim.

(Memorandum, at 9-12 (Docket No. 31)).

Defendants now argue that Plaintiffs have failed to provide evidence sufficient to withstand summary judgment as to either of the theories of liability under the ADA. As to the first theory, that Mr. Champion was arrested because of his disability, Defendants contend that he was arrested because the assaulted Officer Miller, not because of his disability, and cite Officer Miller's testimony to that effect. Plaintiffs argue, on the other hand, that Officer Miller's testimony is not to be believed, and point out that Defendant Delelys did not see Mr. Champion assault Officer Miller.

A review of Defendant Delelys' testimony, however, reveals that she does not dispute that Mr. Champion assaulted Officer Miller, she simply states that she did not see it. (Deposition of Jolene Delelys, at 50-64 (Exhibit A to Defendants' Motion For Summary Judgment (Docket No. 67)). Indeed, she readily admits that she did not see the entire incident as she was caring for her son. (Delelys Deposition, at 56). As for Officer Miller's credibility, in order to avoid summary judgment, Plaintiffs must do more

than question the credibility of the Defendants' witnesses. Accordingly, the Court concludes that Plaintiffs have failed to demonstrate a genuine factual dispute as to the wrongful arrest theory of their ADA claims, and Defendants are entitled to summary judgment as to that part of their claim.

As for the reasonable accommodation theory, the Court concludes that the undisputed facts now show that those cases recognizing a duty to reasonably accommodate an individual in providing services after arrest do not apply here, as Mr. Champion died before he could take advantage of any post-arrest services.

As for the courts that recognize the reasonable accommodation theory in making arrests, only the *Hainze* court specifically described the parameters of such a claim – "once the area is secure and there is no threat to human safety, [the officers] would have been under a duty to reasonably accommodate [the plaintiff's] disability in handling and transporting him to a mental health facility." *Hainze*, 207 F.3d at 802. Therefore, although Plaintiffs vehemently argue that the Defendant officers mishandled the incident and needlessly caused the death of Mr. Champion, the focus of this claim is on the officers' actions after Mr. Champion was handcuffed and secured. From that perspective, Plaintiffs have not shown that Mr. Champion suffered greater injuries after he was handcuffed and secured than would have occurred to arrestees who did not suffer from autism. In other words, the actions Plaintiffs suggest that the officers should have taken to prevent Mr. Champion's death after he was handcuffed were not to accommodate his disability, but would have applied to any arrestee in a similar situation. Accordingly, the Court concludes that Defendants are entitled to

summary judgment on the reasonable accommodation theory of Plaintiffs' ADA claim.[3]

IV. Conclusion

For the reasons set forth above, Defendants' Motion For Summary Judgment is denied in part and granted in part. Defendants are granted summary judgment as to Plaintiffs' ADA claims, and as to Plaintiffs' Section 1983 failure to train claim against Defendant Metropolitan Government.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

[3] Plaintiffs have not responded to Defendants' argument that they are entitled to summary judgment on any ADA failure to train claim. Accordingly, the court grants summary judgment to Defendants as to any failure to train claim as well.

No. 03-5068

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CALVIN B. CHAMPION, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CALVIN D. CHAMPION, DECEASED, ET AL.,	)	
Plaintiffs-Appellees,	)	ORDER
v.	)	(Filed Nov. 02, 2004)
OUTLOOK NASHVILLE, INC., ET AL.,	)	
Defendants.	)	
DEBBIE MILLER, ET AL.,	)	
Defendants-Appellants.	)	

BEFORE: BATCHELDER and MOORE, Circuit Judges; and CALDWELL,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

---

* Hon. Karen K. Caldwell, United States District Judge for the Eastern District of Kentucky, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk/[Illegible]

03-5068

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CALVIN B. CHAMPION, Individually and as personal representative of the Estate of Calvin D. Champion, deceased; JEROME CHAMPION-COLLINS,

Plaintiffs-Appellees,

v.

OUTLOOK NASHVILLE, INC.; JOLENE DELELYS; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; METROPOLITAN POLICE DEPARTMENT,

Defendants,

OFFICERS DEBBIE MILLER, RICHARD WOODSIDE and CRAIG DICKHAUS,

Defendants-Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

PETITION FOR REHEARING AND REHEARING *EN BANC* OF DEFENDANTS/APPELLANTS OFFICERS DEBBIE MILLER, RICHARD WOODSIDE AND CRAIG DICKHAUS

(Filed Sep. 2, 2004)

FRANCIS H. YOUNG
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Counsel for Appellants

REQUIRED STATEMENT
FOR REHEARING EN BANC

I express a belief on a reasoned and studied professional judgment that the panel decision is contrary to the following decision of the Unites States Supreme Court; *Hope v. Pelzer*, 536 U.S. 730 (2002). In addition, on the exceptionally important question of whether the officers in this case are protected by qualified immunity, the panel's decision conflicts with the following authoritative decisions of these other United States Courts of Appeals which have addressed the issue: *Wagner v. Bay City, Texas*, 227 F.3d 316, 323-24 (5th Cir. 2000); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 594 (7th Cir. 1997); *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996); and *Garrett v. Athens-Clarke County, Georgia*, 2004 W.L. 1700118, (11th Cir. 2004) (per curiam) (recommended for publication, copy attached).

/s/ Francis H. Young
Francis H. Young
Attorney for Defendants/
Appellants

INTRODUCTION

This Petition for Rehearing and Suggestion of Rehearing *En Banc* follows the issuance of an opinion on August 19, 2004 (recommended for publication) affirming the trial court's judgment against the defendant police officers in the amount of $300,000 each. Among other things, the panel affirmed the trial court's denial of the officers' post-judgment motion asserting the defense of qualified immunity filed under Fed. R. Civ. P. 50(b).

The points or questions raised in this Petition are:

1. On the question of qualified immunity, does the panel decision conflict with *Hope v. Pelzer*, 536 U.S. 730 (2002)?

2. On the question of qualified immunity, does the panel decision conflict with the authoritative decisions of other U.S. Courts of Appeals which have addressed the issue?

3. Was the law clearly established on the date of this incident that the techniques the officers used to gain control over Calvin Champion violated his right to be free from excessive force?

4. Can Officers Dickhaus and Woodside be liable for using pepper spray since no witness testified that either of them actually pepper-sprayed Calvin Champion?

PURPOSE OF PETITION

Very respectfully, the officers believe that the panel misapplied *Hope v. Pelzer*, 536 U.S. 730 (2002). In addition, in finding that the officers violated Mr. Champion's right to be free from excessive force, the panel found,

contrary to numerous decisions from other circuits, that Mr. Champion had a "clearly established right" to be free from the applications of force used in this case.

In fact, the law was not clearly established so as to put a reasonable officer in defendants' position on notice that his conduct that day supposedly violated any of Mr. Champion's rights.

Factually, no witnesses ascribe the act of pepper spraying to either Officers Dickhaus or Woodside. The officers should not be held liable for any alleged pepper spraying while Mr. Champion was restrained.

This petition seeks *en banc* review or a panel rehearing to address the issues raised herein.

1. The panel decision conflicts with *Hope v. Pelzer*, 536 U.S. 730 (2002).

The issue in *Hope* was whether the status of the law at the time of the incident gave correctional officers fair warning that their treatment of Mr. Hope, a state prisoner, was unconstitutional. The officers had handcuffed Mr. Hope to a "hitching post"[1] and deprived him of water and bathroom breaks on more than once occasion. In *Hope*, six justices found the correctional officers should have been aware that their treatment of Mr. Hope was "cruel and unusual punishment" sufficient to find an Eighth Amendment violation. The majority reviewed the applicable Court of Appeals precedent for the Eleventh Circuit, and it found cases clearly proscribing the handcuffing of

[1] The dissenting opinion noted that the device is actually called a "restraining bar." *Hope*, at 749, n. 1 (Thomas, J., dissenting).

inmates to fences and cells for long periods of time, and depriving them of water. *Id.* at 742-43.

This prior circuit court precedent, coupled with a relevant Alabama Department of Correction regulation and a Department of Justice report regarding constitutional infirmities in using the hitching post, was found to have sufficiently put the correctional officers on notice that handcuffing Mr. Hope to a restraining bar for extended periods and depriving him of water and bathroom breaks constituted "cruel and unusual punishment."

In the instant case, the panel found the officers' objectionable conduct consisted of lying on top of Mr. Champion after he was restrained and pepper-spraying him after he was restrained. Slip Op. at 13. In applying *Hope*, the panel cited to a number of cases which hold that particular types of force used on a suspect after the suspect has been subdued have been found unreasonable and a violation of a clearly established right: *Phelps v. Coy*, 286 F.3d 295, 301 (6th Cir. 2002) (officers continued to beat the suspect); *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988) (a gratuitous blow); and *Lewis v. Downs*, 774 F.2d 711, 715 (unnecessary striking of a handcuffed citizen).

However, these cases all deal with beatings, blows and striking of the suspect, none of which were reported in this case by the officers or the civilian witnesses. As a result, these cases do not establish with the requisite degree of particularity the "contours of the Right" at issue. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The only real factual difference between the *Hope* case and the prior applicable circuit court precedent was that the prior cases involved handcuffing inmates to fences and

cells, and Mr. Hope was handcuffed to a "hitching post." In *Hope*, the Supreme Court held that a reasonable corrections officer should have been able to make the comparison and conclude that handcuffing Mr. Hope to a hitching post for an extended period was similar to the cases holding that handcuffing an inmate to a fence or a cell for an extended period was unlawful. *Id.* at 743. The Supreme Court reached the same conclusion regarding applicable precedent holding it unlawful to deprive an inmate of water for an extended period. *Id.*

Respectfully, the cases cited by the panel are not similar enough to the types of force used in this case for the officers to have concluded that what they were doing violated Mr. Champion's rights. As previously discussed, the Sixth Circuit cases cited by the panel deal with the officers delivering blows and striking a restrained suspect. The two District Court decisions the panel relied upon also provided little guidance to the officers. *See Swans v. City of Lansing*, 65 F. Supp. 2d 625, 633-34 (W.D. Mich. 1998) (putting pressure on a prone, bound detainee which only lasted a few moments of the entire incident); *Johnson v. City of Cincinnati*, 39 F. Supp. 2d 1013, 1019-20 (S.D. Ohio 1999) (case involved municipal liability under a custom, practice or policy theory).

Thus, as to the officers' alleged action of lying on Mr. Champion too long in the context of the violent struggle with a non-verbal, combative suspect, the panel misapplied the holding of *Hope v. Pelzer* in denying the officers qualified immunity.

2. The panel decision conflicts with the authoritative decisions of other U.S. Courts of Appeals which have addressed the issue.

Respectfully, the panel decision conflicts with the holdings of the following cases which have addressed the degree of force used in similar circumstances.

In *Wagner v. Bay City, Texas*, 227 F.3d 316 (5th Cir. 2000), plaintiff's decedent resisted arrest and was pepper sprayed. *Id.* at 318. The officers then placed him face down on the ground, handcuffed him, and allegedly kept a knee on his back and kept his head down with a stick. *Id.* The facts were conflicting regarding how long he was on the ground, how roughly the officers treated him, how much pepper spray was used, and whether the officers dragged him and treated him aggressively after he stopped struggling. *Id.* at 321.

In spite of this conflicting evidence, the court found the officers were protected by qualified immunity. The court found the officer's restraint to be "not objectively unreasonable, even where he subsequently died of asphyxiation." *Id.* at 324. The court found there was no "preexisting law" which would have put the officers on notice that their conduct was unlawful. *Id.* at 323.[2]

Another factually similar case is *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 594 (7th Cir. 1997). Plaintiff's decedent was acting in a bizarre manner in an hotel, and police officers were summoned to restrain him.

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[2] While *Wagner* was decided 5 months after the incident at issue in the instant case, it is notable that the court could not find a single case calling into doubt the legality of the method of restraint used by the officers in this case.

The officers struggled with him, they placed him face down on the floor, they handcuffed him and one officer placed a knee on his back. *Id.* at 589. Another officer attempted to restrain his legs, and eventually a leg restraint had to be applied. *Id.* Tragically, he died, but the court held the officers did not violate his constitutional rights.

Similarly, in *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996), police officers responded to a domestic call to find the decedent's grandmother complaining that her grandson had psychological problems, that he had stopped taking his medication, and that he needed to be taken to a hospital. *Id.* at 1488. Six officers became involved in a 20-25 minute struggle with the grandson, in which the officers had to use force to place him in handcuffs and leg restraints. *Id.* at 1488-89. The officers placed him face down on the floorboard of the rear seat of a patrol car, and one officer rode in back with him, but at some point during the 5-minute ride to the police station, the grandson succumbed to positional asphyxia. *Id.* The court granted the officers qualified immunity as to plaintiff's 14th Amendment "custodial mistreatment" claim, and the Fourth Amendment use of force claim, finding no constitutional violations occurred. *Id.* at 1491-92.

Finally, in *Garrett v. Athens-Clarke County, Georgia*, 2004 W.L. 170018, (11th Cir. 2004) (per curiam) (recommended for publication, copy attached), an individual succumbed to positional asphyxia after a protracted struggle with police during which he was pepper sprayed and "fettered." During the struggle, the officers "dove on top of [the suspect] to hold him to the ground." *Id.* at *2.

In *Garrett*, the court found that chemical spray, and the position into which he was placed (after an intense struggle) do not, of themselves, pose a high potential for death or serious bodily injury. *Garrett*, at *4-5. In *Garrett*, as in the instant case, there was no expert proof whatsoever that the methods employed to restrain the individual carried with them a high risk of death or serious bodily harm. In fact, Dr. John Gerber, the medical examiner who performed Mr. Champion's autopsy, testified there is no evidence that pepper spray, even repeated applications of it, causes asphyxia. (Trial transcript Vol. III, at 534-35, Apx. at 222-23).

The *Garrett* court found no Fourth Amendment violation occurred. However, the Court went so far as to hold that even if a Fourth Amendment violation had occurred, on the day of the incident (June 17, 1997) there was no "clearly established law" which would have informed an objectively reasonable officer that the amount of force used on Mr. Garrett constituted a Fourth Amendment violation. *Id.* at *6.

Respectfully, the panel's decision conflicts with this controlling authority.

3. The law as not clearly established on the date of this incident that the techniques the officers used to gain control over Calvin Champion violated his right to be free from excessive force.

There was no case law prior to April 30, 2000[3] which could have given the officers guidance as to whether this

[3] There is a typographical error on page 2 of the panel decision regarding the date of the incident. The incident occurred on April 30, 2000.

manner of restraint violated any "clearly established right" of Calvin's. Both the *Phillips* and *Cottrell* cases specifically found similar conduct to be **lawful** under the Fourth Amendment. There were no factually similar cases from the Supreme Court, the Sixth Circuit or elsewhere proscribing the manner of restraint used by the officers. In recognition of the authority from two other circuits expressly declaring such a restraint procedure to be constitutional, there was nothing to indicate to these officers on that day that their conduct violated Mr. Champion's civil rights.

4. Officers Dickhaus and Woodside cannot be liable for using pepper spray since no witness testified that either of them actually pepper-sprayed Mr. Champion

The panel decision describes the conflicting witness accounts of the amount of force actually used to restrain Mr. Champion on page 7 of the slip opinion. Notably absent, however, is any testimony that either Officers Dickhaus or Woodside, who are both male, ever pepper-sprayed Mr. Champion. One of the few things the witnesses appear to agree on is that the female officer (Officer Debbie Miller) is the only one who allegedly pepper-sprayed Calvin that day.

Respectfully, the panel erroneously ascribes the act of pepper spraying to all of "the officers." (Slip op. at 15). This error in characterizing the testimony is crucial to the outcome of the case as to Officers Dickhaus and Woodside, since based on the discussion in section 3 above, there was insufficient case law as of the date of the incident to put them on notice that merely lying on top of Mr. Champion during the struggle would violate any of his constitutional

rights. The only other allegedly excessive application of force is the alleged act of pepper spraying, which even talking the witness testimony in the light most favorable to plaintiff, was not performed by either of these two male officers. (Slip op. at 7).

Despite the panel's holding that either act of allegedly excessive force would have violated Mr. Champion's rights that day, once Officers Dickhaus and Woodside are absolved from liability for allegedly pepper spraying Mr. Champion, they only have to answer to the charge that they allegedly laid upon him too long after he was restrained. However, given the holdings of *Wagner*, *Phillips*, *Cottrell*, and *Garrett*, *supra*, the law was anything but clear on the day of the incident that laying on a suspect like Mr. Champion too long would violate his constitutional rights. Thus, when this act is viewed as these officers' sole alleged transgression, they are entitled to qualified immunity.

Dr. Charles Wetli – defendant's expert medical examiner – testified that it would take about 5 minutes of complete compression and immobilization of Calvin's lungs to cause asphyxia. (Tr. Vol. V at 1001-04, Apx. pg. 284-87). A reasonable officer could not be expected to know this. Even if the officers did lay upon Calvin's back, they were trying to restrain him, not kill him. A reasonable officer in the defendants' position that day would not have expected Calvin to suddenly stop breathing and expire based upon the way he was being restrained, even if plaintiff's witnesses are to be believed. A reasonable officer would have no idea that Calvin had an anomalous angulated right coronary artery, which both Drs. Gerber and Wetli testified could cause death either with or without the added

stress of a struggle. (Tr. Vol. III at 505-508, Apx. pg. 203-206; Vol. V at 985, Apx. pg. 276).

Even if the officers did put pressure on Calvin's back during the restraint, the above-cited cases hold that such a tactic would not be unlawful, since it is "objectively reasonable" to try to restrain a person who is resisting arrest in that manner.

For the foregoing reasons, the officers respectfully request *en banc* review, or alternatively a panel rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U. S. Mail, postage prepaid, to James D. Montgomery, Esquire, 1 North LaSalle Street, Suite 2450, Chicago, Illinois 60602, this 1 day of September, 2004.

/s/ Francis H. Young
Francis H. Young